

(25,914)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1084.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
APPELLANT,

vs.

WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Thursday, November the eighteenth, A. D. 1915, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable William T. Newman, District Judge.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

versus

WESTERN UNION TELEGRAPH COMPANY, Appellee.

Be it remembered, that heretofore, to-wit, on the 1st day of May, A. D. 1915, a transcript of the record of the above styled cause, pursuant to an appeal from the District Court of the United States for the Southern District of Mississippi, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2772, as follows:

Transcript of Record.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2772.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

versus

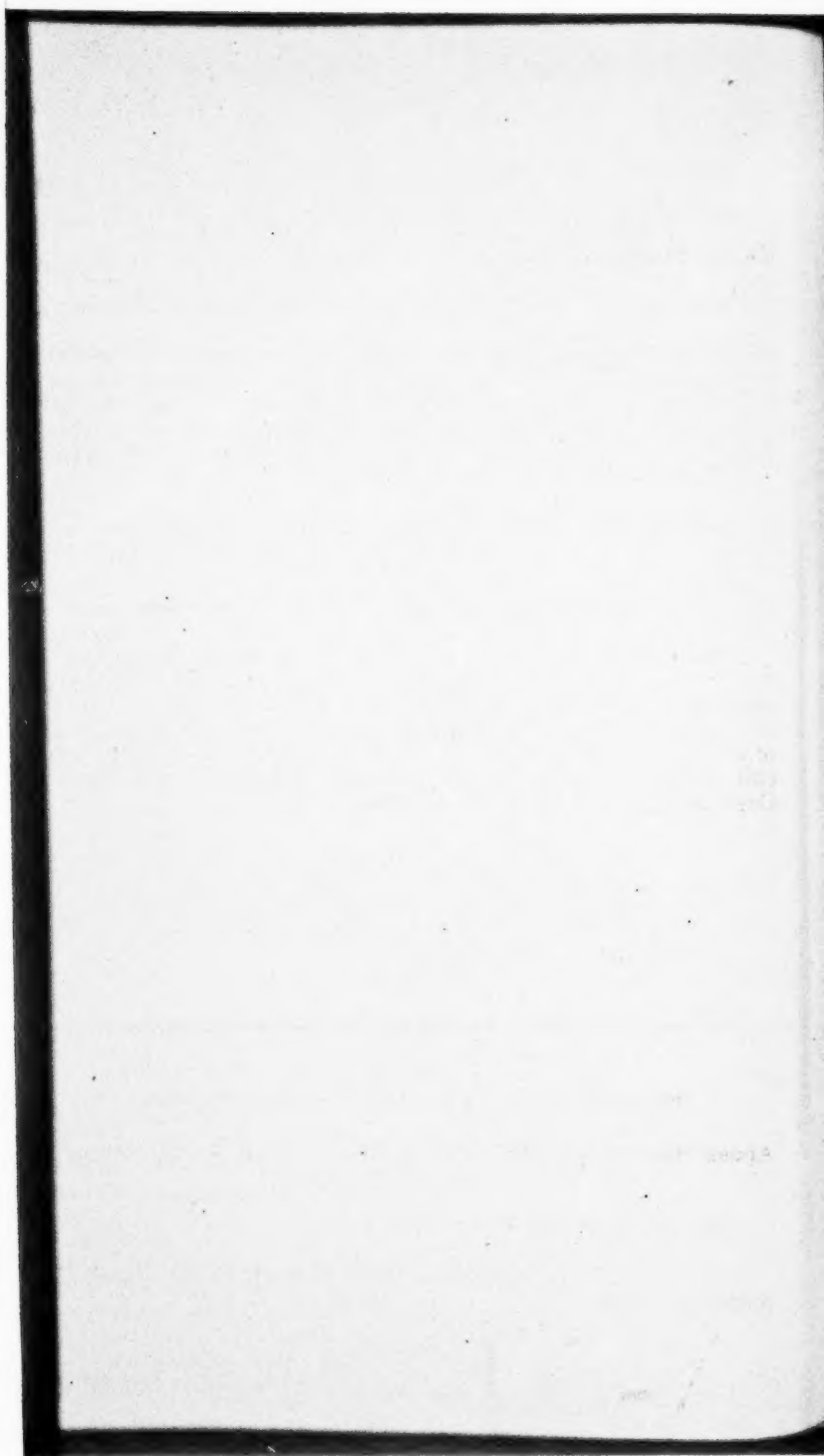
WESTERN UNION TELEGRAPH COMPANY, Appellee.

Appeal from the District Court of the United States for the Southern District of Mississippi.

[Original record filed May 1, 1915.]

U. S. Circuit Court of Appeals. Filed May 22, 1915. Frank H. Mortimer, Clerk.

(a)



IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DIVISION OF
THE SOUTHERN DISTRICT OF MISSISSIPPI.

PLEAS AND PROCEEDINGS had and done at a regular term of the District Court of the United States for the Southern Division of the Southern District of Mississippi begun and held on the 15th day of February, 1915, at Biloxi, Mississippi, that being the regular time and place designated by law for the holding of said Court, Present and presiding the Honorable H. C. Niles, U. S. Judge, Hon. R. C. Lee, United States Attorney, Hon. L. B. Moseley, Clerk, and Hon. John G. Cashman, United States Marshal for said District. Among the proceedings had and done were the following, to-wit:

2 UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DIVISION OF THE
SOUTHERN DISTRICT OF MISSISSIPPI

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

versus

WESTERN UNION TELEGRAPH COMPANY.

To the Honorable H. C. Niles, Judge of the District Court of the United States for the Southern Division of the Southern District of Mississippi.

The Louisville & Nashville Railroad Company, a corporation created by, and organized under, the laws of the State of Kentucky, having its principal place of business in the City of Louisville, in the State of Kentucky, and a citizen of the State of Kentucky, brings this, its bill of complaint against The Western Union Telegraph Company, a corporation created by, and organized under, the laws of the State of New York, and having its principal place of business in the City of New York, and a citizen of said State, and shows unto your Honor:

That this is a suit between citizens of different states of the United States, viz., between the Louisville & Nashville Railroad Company, a citizen of the State of Kentucky, and the Western Union Telegraph Company, a citizen of the State of New York, and the amount in dispute, between the complainant and defendant, exclusive of interest and costs, exceeds the sum of three thousand dollars, (\$3,000.00);

3 it is brought to enforce a claim to, and to remove a cloud from, the title to real property, situate in the State of Mississippi, within the Southern Division of the United States Southern Judicial District of said State. The real estate upon which the complainant seeks to enforce a claim, and from the title to which it seeks to remove a cloud, consists of a strip of land, constituting complainant's right of way, lying on each side of its main railroad track, and extending from the dividing line between the County of Jackson, in the State of Mississippi, and the County of Mobile, in the State of Alabama, to the dividing line between the County of Hancock, in the State of Mississippi, and the State of Louisiana, including its bridges in the Counties of Harrison and Hancock, in the State of Mississippi. The property so taken is more particularly described in the several judgment entries hereinafter set out, purporting to be judgment entries of Courts of eminent domain.

II.

If Complainant does not enforce its said claim, and remove said cloud from its title to said real estate, it will be deprived of its property without due process of law, and will also be denied the equal protection of the laws under color of right arising out of the provision of a legislative enactment of the State of Mississippi. For protection against the taking of its said property, and against such denial to it of the equal protection of the law, Complainant relies upon, and invokes the aid and protection of, so much of the Fourteenth Amendment to the Constitution of the United States, as is in these words:

"No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Complainant avers, however, that the alleged condemnation proceedings are void for other reasons shown by the allegations of this bill of complaint, and that it would, therefore, be entitled to the relief prayed for, even had its property not been taken without due process of law, or it denied the equal protection of the law.

III.

The property sought to be condemned formerly belonged to the New Orleans, Mobile & Texas Railroad Company, as re-organized, but in 1881 Complainant purchased from said Company all of the railroad property then belonging to it, and received a duly executed conveyance thereof, and has, for more than twenty years, owned a fee simple title to, and has under a claim of ownership, used, occupied and been in the continuous and exclusive possession of, the right of way and bridges sought to be subjected to the used of the Defendant, the Western Union Telegraph Company, by the condemnation proceedings hereinafter mentioned.

IV.

The Defendant, the Western Union Telegraph Company, owns, maintains and operates, and for many years has owned, maintained and operated a line of telegraph poles and wires upon and along the said right of way, and from the dividing line between the State of Alabama and the State of Mississippi and the State of Louisiana. Said telegraph line is, and has for many years been, located, maintained and operated upon complainant's said right of way, and upon or attached to its said bridges, under a contract between the Complainant and the Defendant, the Western Union Telegraph Company, and not otherwise, and by one of its provisions said contract may be ter-

mined [terminated] by either of the parties thereto at the expiration of one year, after written notice shall have been given by one of the parties thereto, to the other of said parties, of a desire or intention to terminate the same. Said contract will terminate on August 17th, 1912, pursuant to a notice that has been given thereof by the defendant as provided by the terms of said contract.

5

V.

Under an alleged power of eminent domain, which it claims is vested in it by the laws of the State of Mississippi, the Defendant, the Western Union Telegraph Company, attempted to obtain, by the proceedings herein alleged and complained of, the right to continue the use of Complainant's said right of way for the maintenance and operation of said Western Union Telegraph Company's said existing line of poles and wires thereon, without any intention to construct any new telegraph line, and to this end the said Defendant, the Western Union Telegraph Company presented three separate applications for the condemnation and use of the defendant, the Western Union Telegraph Company, of parts of Complainant's said right of way and bridges lying in said respective counties, as hereinafter alleged.

VI.

A copy of each of said applications are hereto attached, and made parts hereof, and are marked Exhibits "A", "B", and "C", respectively.

VII.

Section 1854, Chapter 43, of the Code of Mississippi of 1906 provides as follows:

"Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, and not otherwise, except as specified in the Chapter on landings, mill and mill dams and roads, ferries and bridges."

Section 1856, which is likewise part of Chapter 43 of the Code of Mississippi of 1906, provides as follows:

"When any person or corporation having the right to do so shall desire to exercise the right of eminent domain, he or it shall make application therefor, in writing, and the owners of the property sought to be condemned, and the mortgagees, trustees, or other persons having an interest therein, or a lien thereon, shall be made defendants thereto, which shall state, with certainty, the right, and describe the property sought to be condemned, showing that of each defendant separately. Applications shall be presented to the Clerk of the Circuit Court of the County who shall indorse thereon his appointment of a competent Justice of the Peace of the county in which the property, or some part of it, is situated, to constitute, with a jury, a special Court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

The application of which Exhibit "A" is a copy, was presented to A. J. Ramsey, Jr., the Deputy
6 Clerk of the Circuit Court of Harrison County, Mississippi, and thereupon said Deputy Clerk made a separate order, in writing, appointing one H. D. Moore, a Justice of the Peace, of Harrison County, Mississippi, to try, with a jury to be drawn, the issue between the Complainant and the Defendant, and fixed the 27th day of December, 1911, at 10 o'clock A. M. in the Court House of Harrison County, Miss., for the organization of a Court of eminent domain, but made no indorsement of such appointment upon the application presented to him by the Complainant.

The application of which Exhibit "B" is a copy was presented by Complainant to one W. C. Havens, the Deputy Clerk of the Circuit Court of Jackson County, Miss., and upon the presentation of such application to the said Havens, he, the said Havens, made and order, in writing, appointing one Chas. E. Chidsey, a Justice of the Peace of Jackson County, Miss., to try, with a jury which was summoned, the issue between the Complainant and the Defendant, and fixed the 10th day of January, 1912, in the Court House of Jackson County, Mississippi, for the

organization of a special Court of eminent domain, but said appointment was not indorsed upon the application.

Thereafter, on the 29th day of December, 1911, Fred Taylor, who was the Clerk of the Circuit Court of Jackson County, made an indorsement upon said application, and reissued and caused a new summons to be served upon the Complainant, the said indorsement reading as follows:

"Western Union Telegraph Company, vs. Louisville & Nashville Railroad Company.

I, Fred Taylor, Clerk of the Circuit Court of Jackson County, do hereby certify that the petition upon which this indorsement is made, was filed in my office on the 25th day of November, A. D. 1911, and immediately upon the filing of said petition, I appointed and constituted Charles E. Chidsey a duly qualified Justice of the Peace of said County, to try, with a jury drawn according to law, the issue between the Western Union Telegraph Company, and the Defendant, the Louisville & Nashville Railroad Company, et als, which appointment was made in writing and duly filed with the papers in the cause, and I fixed 10 o'clock A. M. of the 10th day of January, A. D. 1912, at the Court House of said Court House of said County at Pascagoula, Miss., as the time and place for the hearing of said cause, all of which was done
7 in writing and duly filed in the records of this case.

Now, therefore, in pursuance of said acts, and in order to further evidence the same, I now on this the 29th day of December, make this indorsement upon said petition, and also attach and affix to said petition the required appointment and designation made by me at the time said petition was filed.

Given under my hand, this the 29th day of Dec. A. D. 1911.

FRED TAYLOR,
Clerk Circuit Court Jackson Co.

Upon the hearing of the application by the alleged Court of eminent domain, on the 10th day of January, 1912, the Defendant, the Western Union Telegraph Company,

amended its said application, and a copy of said amendment is hereto attached marked Exhibit "D", and made a part hereof.

The application of which Exhibit "C" is a copy was presented by the Complainant to W. W. Stockstill, the Clerk of the Circuit Court of Hancock County, Mississippi, and he, the said W. W. Stockstill, made an order, in writing, appointing John A. Breath, a Justice of the Peace of said County, to try, with a jury to be drawn, the issues between the Complainant and the Defendant, and affixed the 8th day of January, 1912, in the Court House of Hancock County, Mississippi, for the organization of a special Court of eminent domain, but said appointment was not indorsed upon the application.

Thereafter, on the 30th day of December, 1911, the said W. W. Stockstill, Clerk of the Circuit Court of Hancock County, made an indorsement upon the application, and reissued and caused a new summons to be served upon the Complainant, the said indorsement reading as follows:

"Western Union Telegraph Company, vs. Louisville & Nashville R. R. Co. et als.

I, W. W. Stockstill, Clerk of the Circuit Court of Hancock County, do hereby certify that the petition upon which this indorsement is made, was filed in my office on the 28th day of Nov. A. D. 1911, and immediately upon the filing of said petition I appointed and constituted Mr. J. N. O. Breath, a duly qualified Justice of the Peace of said County, to try with a jury drawn according to law, the issue between the Western Union Telegraph Company and the Defendants, the Louisville & Nashville Railroad Company, et als, which appointment was made in writing and duly filed with the papers in this case, and I fixed 10 o'clock A. M. of the 8th day of January, A. D. 1911, at the Court House of said County in Bay St. Louis,
 8 as the day and place for the hearing of said cause,
 all of which was done in writing and duly filed in the records of the cause.

Now, therefore, in and by reason of said action, and in order to further evidence same, I now, on the 30th day of December, make this indorsement upon said petition, and

also attach to said petition the original appointment and designation made by me at the time said petition was filed.

Given under my hand this the 30th day of December, A. D. 1911.

(Signed)
(Seal)

W. W. STOCKSTILL,
Clerk, Circuit Court, Hancock
County.

VIII.

On the 27th day of December, 1911, the said H. D. Moore, and the jury drawn for that purpose, organized what purported to be a court of eminent domain.

Before the said Justice of the Peace and jury, purporting to act as a Court of eminent domain, entered upon the hearing of the testimony, the Defendant in said proceeding, the Louisville & Nashville Railroad Company, protested against proceeding with the hearing of the application of the Western Union Telegraph Company, to condemn any portion of the right of way and bridges of the Complainant, on the ground that no competent Justice of the Peace had been appointed by indorsing such appointment on the application for condemnation, as required by law, and the said H. D. Moore was without authority to proceed with said condemnation proceeding. Disregarding said protest, the said alleged Court of eminent domain proceeded to hear evidence as to the value of the property to be taken, and after said evidence had been heard, the said jury returned a verdict in the following language:

"We, the jury find that the Defendants, the New Orleans, Mobile & Texas Railroad Company, as re-organized, the Louisville & Nashville Railroad Company, and the Farmers Loan & Trust Company, will be damaged, by the taking of their property for public use, in the sum of \$150.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said alleged Court of eminent domain, entered the following judgment:

"In this case the claim of the Western Union Telegraph Company, to have condemned certain lands and property named in the application to-wit: So much of the right

9 of way of the main line of the Louisville & Nashville R. R. Co., as lies in Harrison County, Miss., running from a point on the said right of way on the line dividing the Counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the Defendant Railroad Company spanning the said Bay of Biloxi; on the east, and thence extending westwardly through the County of Harrison to the dividing line between said County and Hancock County, on the west which is a point in the middle of the Bay of St. Louis, and on the bridge of the defendant Railroad Company, spanning said Bay of St. Louis, being a distance of thirty miles more or less, and which route is shown and delineated on a map of blue print annexed to applicants Petition as Exhibit "A". Said right of way being 100 feet wide and constituting with those portions of the bridges lying in Harrison County a continuous strip of land extending from Jackson County line on the east to the Hancock County line of the defendant between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross arms and wires to such proper and prudent means as will in no wise endanger or impair said bridges, and will in no wise hamper, impede, obstruct, or interfere with the use thereof by said defendants and others authorized to use same.

This condemnation for the purpose of permitting said Western Union Telegraph Company to erect one line of poles with cross arms and wires upon and along said right of way and bridges of said defendants, all in the manner and with all the safeguards set forth in petitioners petition, that is to say in such manner and at such distance from the defendants track as in no way to interfere with the operation of trains of said defendants or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petitioned contained, being the property of the L & N. R. R. Co. and the New Orleans, M. & T. R. R. Co., as re-organized, and in which the Farmers Loan & Trust Co. is interested as the Trustee in certain mortgages was submitted to a jury composed of A. V. Marshall, H. J. Gillen, John Wein,

Armound Sellier, J. B. Ladnier, Tom Cousins, J. J. Bond, W. W. Harrison, Joseph Sancier, L. A. Witter, F. S. Bond, and A. F. Breland, on the 28th day of Dec. A. D. 1911, and the jury returned a verdict fixing the defendants due compensation and damages at \$150.00 and the verdict was received and entered. Now upon payment of said award applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs for which let execution issue Dec. 28, 1911.

H. D. MOORE,
Justice of the Peace.

The Western Union Telegraph Company tendered to the Complainant the amount of damages so adjudged, with interest, but the same was not accepted by Complainant.

On the 8th day of January, 1912, the said John A. Breath, Justice of the Peace as aforesaid, together with the jury drawn, met at the Court House of Hancock County, and organized what purported to be a special Court of eminent domain.

10 Before said alleged Court of eminent domain proceeded to take testimony, the Defendant protested against proceeding with the hearing of the application of the Defendant to condemn any portion of the right of way and bridges of the Complainant, upon the ground that no competent Justice of the Peace has been appointed by an indorsement upon Complainant's application for condemnation, and that the said John A. Breath was therefore without jurisdiction or authority to proceed in said matter. The said alleged Court of eminent domain disregarded said protest, and proceeded to hear the evidence as to the value of the property to be taken, and after said evidence has been heard, the jury rendered a verdict in the following language:

"We, the jury, find that the Defendants, the New Orleans Mobile & Texas Railroad Company, as re-organized, the Louisville & Nashville Railroad Company, and the

Farmers Loan & Trust Company, will be damaged by the taking of their property for public use, in the sum of \$650.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said court of eminent domain entered the following judgment:

"In this case the claim of the Western Union Telegraph Co. to have condemned certain lands and property named in the application to-wit: So much of the right of way of the main line of the Louisville & Nashville R. R. Co., as lies in Hancock County, Mississippi; running from a point on said right of way on the dividing line between the counties of Hancock and Harrison on the bridge crossing the Bay of St. Louis on the East, and thence extending through the County of Hancock to the head of the stream of East Pearl river, which is the western boundary of the State of Mississippi, separating same from the State of Louisiana, being a distance of seventeen (17) miles more or less, and which said route is shown or delineated on a map or blue print annexed to petitioner's petition, marked Exhibit "A". The said right of way being about one hundred (100) feet wide, and constituting together with that portion of the bridge over the Bay of St. Louis lying in Hancock County, and that portion of the East Pearl river bridge lying in the State of Mississippi, one continuous and contiguous strip and body of land and tract extending from the Harrison County line on the east, to the Louisiana line on the west, and being the right of way over which the mail line of the said defendants between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross arms and wires to such portions of the bridges over Bay St. Louis and East Pearl river above mentioned, as lie within said Hancock county, in such convenient and proper way, and by such proper and prudent means, as will in no wise endanger or impair said bridges, and will in no wise, hamper, impede, obstruct or interfere with the use thereof by defendants, and all others authorized to use same. This condemnation being for the pur-

pose of permitting said Western Union Telegraph Co. to erect one line of poles with cross-arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all the safeguards set forth in petitioner's petition, that is to say, in such manner and at such distance from defendants track as in no way to interfere with the operation of trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the L. & N. R. R. Co. and the N. O. M. & T. R. R. Co., as re-organized, and in which the Farmers Loan & Trust Co. is interested as the Trustee in certain mortgages, was submitted to a jury composed of: J. P. Adams, Elmer Bourgeois, A. A. Hart, C. L. Joyner, Alfred Koenan, Salvator Nicaise, Alfred Besancon, Thos. J. Conway, G. H. Vairin, Emile Pene, Louis Tricon, and W. W. Driver, on the 8th and 9th days of Jan. A. D. 1912, and the jury returned the verdict fixing the Defendants due compensation and damages at six hundred and fifty dollars, and the verdict was received and entered. Now upon payment of said award applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs for which let execution issue.

Jan. 9, 1912.

(Signed)

J. A. BREATH,
Justice of Peace.

The Defendant, the Western Union Telegraph Company, thereafter tendered to Complainant, the amount of damages so adjudged, with interest, but the same was not accepted by the Complainant.

On the 10th day of January, 1912, the said Charles E. Chidsey, Justice of the Peace as aforesaid, together with the jury drawn, met at the Court House of Jackson County, and organized what purported to be a Special Court of eminent domain.

Before said alleged Court of eminent domain proceeded to take testimony, the Defendant protested against proceeding with the hearing of the application of the Defendant to condemn any portion of the right of way of the Complainant, upon the ground that no competent Justice of the Peace had been appointed by an indorsement upon Complainant's application for condemnation, and that the said Charles E. Chidsey was therefore without jurisdiction or authority to proceed in said matter. The said alleged Court of eminent domain disregarded said protest, and proceeded to hear the evidence as to the value of the property to be taken, and after said evidence had been heard, the jury rendered a verdict in the following language:

"We, the jury, find that the Defendants, the New Orleans Mobile & Texas Railroad Company, as re-organized,
 12 the Louisville & Nashville Railroad Company,
 and the Farmers Loan & Trust Company, will
 be damaged by the taking of their property for
 public use, in the sum of \$150.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said Court of eminent domain entered the following judgment:

State of Mississippi,
 Jackson County,

Special Court of Eminent Domain.

Western Union Telegraph Company,

vs.

Louisville & Nashville Railroad Co., et als.

In this case the claim of the Western Union Telegraph Company to have condemned certain lands and property named in the application, to-wit: So much of the right of way of the main line of the Louisville & Nashville Railroad Company as lies in Jackson County, Mississippi, running from a point on the right of way of said Railroad

Company on the dividing line between the States of Alabama and Mississippi, near Pecan Station on the East, thence extending through the County of Jackson to the dividing line separating the Counties of Jackson and Harrison in the State of Mississippi, being a distance of twenty-two (22) miles more or less, and which said route is shown and delineated on a map or blue print filed with petitioner's petition marked Exhibit "A", excepting so much thereof as consists of bridges in said Jackson County. Said right of way being one hundred (100) feet wide, and constituting the right of way of said Railroad Company lying in Jackson County, Mississippi, and extending from the Alabama line on the East to the Harrison County line on the West, being the right of way over which the main line of said Railroad between New Orleans and Mobile is now constructed and being operated, excepting so much thereof as consists of bridges in said Jackson County.

This condemnation being for the purpose of permitting said Western Union Telegraph Company to erect one line of poles with cross-arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all the safeguards set forth in petitioner's petition.

"That is to say—in such manner and at such distance from defendants track as in no way to interfere with the operation of trains of said defendants or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone Company now existing thereon and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the Louisville & Nashville Railroad Company, and in which the Farmers Loan & Trust Company is interested as the Trustee in certain mortgages was submitted to a jury composed of

13 on the 10th and 11th days of January, A. D. 1912, and the jury returned a verdict fixing the defendants due compensation and damages at one hundred and fifty (\$150.00) dollars and the verdict was received and entered. Now upon payment of said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs for which let execution issue."

Jan. 11, 1912.

.....
Justice of the Peace.

IX.

Chapter 43 of the Code of Mississippi provides, as hereinabove shown, for the creation of a special statutory Court of eminent domain, but said Court, under said provisions, can be created and given jurisdiction only by proceeding in strict conformity with the provisions of said chapter. By the provisions of said chapter hereinabove set out, authority is conferred upon the Clerks of said several Courts to appoint a competent Justice of the Peace to serve as part of a special Court of eminent domain, and to cause a jury to be drawn and summoned but does not confer such powers upon the Deputies of such Clerks, or upon any other person.

Said Chapter 43 authorizes and empowers the said Clerks of the Circuit Courts to appoint a competent Justice of the Peace by indorsing the same upon the application of condemnation so presented to them, but does not authorize such Clerks to appoint such Justices of the Peace by separate order, not indorsed upon such application.

Complainant shows to the Court that the whole proceedings for the condemnation of its right of way attempted to be had in Harrison, Jackson and Hancock Counties, are void, because the several Justices of the Peace who presided over, and acted as parts of said alleged Courts of eminent domain, were not appointed by indorsement made upon the applications presented by the Western Union Telegraph Company.

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Complainant shows to the Court that in addition to this, the proceedings under which condemnation of its right of way in Jackson and Harrison counties were attempted, were void, for the further reason:

1. Because the applications by which the said proceedings purported to have been commenced, were not presented to the several Clerks of said Counties.

2. Because the Clerks of said Counties made no appointment of a competent Justice of the Peace to act in said proceedings.

X.

Complainant further shows to the Court that Chapter 43 of said Code of Mississippi, which the chapter referred to in Section 929 of the Code of Mississippi, giving a right of condemnation to telegraph and telephone companies, prescribed the method in which eminent domain shall be exercised by persons and corporations having the power of eminent domain, but neither said chapter, nor said Section 929, nor any other law of the State of Mississippi, extending the right to exercise said power of eminent domain to property which was already devoted to public use, and Complainant's said right of way was, at the time that said condemnation proceedings were instituted, still is, and for many years prior thereto, has been devoted to public use, viz, to the use of Complainant for the purpose of a common carrier railroad and right of way therefor.

XI.

Complainant further shows to the Court that said Western Union Telegraph Company had no power or authority to condemn, to its use, any portion of Complainant's right of way and bridges, in that:

- (a) The only right which it had, or claimed to have, to condemn the said right of way and bridges
 15 of Complainant was conferred upon it by Sections 925 and 929 of the Code of Mississippi of 1906, and by the provisions of Chapter 43 of said Code of Mississippi, prescribing the method in which the right of eminent domain should be executed.

The said Section 925 of the Code of Mississippi authorizes all Companies or Associations of persons, incorporated or organized for the purpose of constructing telegraph and telephone lines, to construct the same, and to set up and erect their posts and fixtures along and across any of the public highways, streets and waters, and along and across

all turn-pikes and railroads, but it does not authorize such telegraph and telephone companies to condemn the rights of way of railroads, or to set up and erect their posts and fixtures across or along said rights of way without the consent of the said Railway Companies, and Complainant did not consent to the use of its right of way or bridges, or any part thereof, for the construction of said telegraph lines of the Defendant, the Western Union Telegraph Company.

(b) Said Section 929 of the Code of Mississippi of 1906 gave to the telegraph and telephone companies the power to exercise the right of eminent domain as provided in the chapter of the Code of Mississippi on that subject for the purpose of constructing new lines, but it did not give to such telegraph and telephone companies any right of eminent domain for the continuance and maintenance of any existing telegraph line. So much of said Section as relates to said matter reads as follows:

"Telegraph and telephone companies, for the purpose of constructing new lines are empowered to exercise the right of eminent domain as provided in the chapter on that subject."

Complainant further shows to the Court that neither under Section 925 nor 929, nor under any other law of the State of Mississippi, was there vested in the Defendant, the Western Union Telegraph Company, any right or power to condemn, to its use, any portion of the said right of way and bridges of the Complainant, the Louisville & Nashville Railroad Company, for the purpose of maintaining an existing telegraph line.

16 Complainant further shows to your Honor that although it is alleged in the several petitions of the Western Union Telegraph Company that the telegraph line for which it is desired to condemn a right of way was to be a new line, in fact and in truth the said Western Union Telegraph Company did not desire said right of way for the purpose of erecting any new telegraph line, nor did it intend to use the same for that purpose. It desired and intended to obtain said right of way for the

purpose of maintaining its existing telegraph line thereon. This was shown, by the testimony introduced by the Defendant, the Western Union Telegraph Company, in each of said condemnation proceedings, and the said Western Union Telegraph Company had no right to condemn the property of the Defendant for said purpose.

XII.

By the 17th Section of the Constitution of Mississippi, it was and is provided as follows:

"Private property shall not be taken or condemned for public use except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law, and whenever an attempt is made to take private property for a use alleged to be public, whether the contemplated use be public shall be a judicial question, and as such determined without regard to legislative assertion that the use is public."

As heretofore alleged the only right vested in the Complainant, the Western Union Telegraph Company, by the laws of Mississippi, to condemn the right of way of this Complainant, was conferred upon it by Section 929 of the Code of Mississippi, and by said Section it is only authorized to condemn such property "for the purpose of constructing new lines," and a new line is constructed within the meaning of said statute as declared by the Supreme Court of Mississippi, whenever the telegraph company changes its route and runs its line in a different route from that already occupied by it, involving the necessity of taking and occupying lands not before occupied by it.

17 By Section 925 of the Code of Mississippi, telegraph companies are authorized to construct their lines along and across public highways, streets and waters, and along and across turn-pikes, railroads, canals, and other public lands, but it is expressly provided that "the same shall be so constructed and placed as not to be dangerous to persons or property, or interfere with the

common use of roads, streets or waters, or with the convenience of any land owner, more than may unavoidable."

Under the provisions of Chapter 43 of the Code of Mississippi, the several Clerks of said Circuit Court to whom the law requires the applications for condemnation of lands to be presented, had no power or authority to hear or determine upon the presentation of said applications to them, nor did said Deputy Clerks have any power or authority to hear or determine, upon the presentation of such applications to them:

1.—Whether the use for which the Western Union Telegraph Company sought to condemn the property of the Complainant was a public use, or

2.—Whether the property of Complainant sought to be condemned by the Western Union Telegraph Company was already devoted to a public use, and whether, if so devoted, it was subject to condemnation by the said Western Union Telegraph Company for the purpose set out in its several applications, or

3.—Whether the Western Union Telegraph Company sought by several said applications, to condemn the property of Complainant for the use of a new line, or only for the maintenance of an existing line, or

4.—Whether the construction of the said telegraph line, as proposed under said applications for condemnation, would be so placed as not to be dangerous to persons or property, or interfere with the common use of Complainant's right of way more than might be unavoidable, or

5.—As to what interest Complainant had in the property sought by the said Western Union Telegraph Company to be condemned.

18 So much of said Chapter 43 as relates to this matter is contained in Section 1856 of the Code of Mississippi, and reads as follows:

"When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor, in writing, and the owners of the property sought to be condemned, and mortgages, trustees or other persons having an interest therein, or a lien thereon, shall be made defendants thereto, which shall state with certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the Clerk of the Circuit Court of the County, who shall indorse thereon his appointment of a competent Justice of the Peace of the County in which the property, or some part thereof, is situated, to constitute, with a jury, a special Court of eminent domain; and he shall fix the time and place in the County for the organization thereof."

Under Section 1858 of the Code of Mississippi, which is a part of said Chapter No. 43, the said sheriffs of the several counties were required to execute the summons and venire facias, provided for the indorsements of the Clerks as aforesaid, and make due return thereof to the Justices of the Peace, at times and places fixed; and under Section 1862 of the Code of Mississippi, which is also a part of said Chapter 43, the said Justices of the Peace were required to organize said juries, and were expressly denied the right to quash the proceedings or dismiss the court of eminent domain for any cause, and said section expressly prohibits an appeal from said proceedings until after a verdict is rendered, reads as follows:

"The Justice of the Peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning, or empaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury."

By Section 1856 of the Code of Mississippi, which is also part of said Chapter 43, the form of the charge to be given the jury, by the Justice of the Peace, is prescribed,

19 and said form of charge expressly submits to the jury only the determination of the amount of damages which the defendant, in the condemnation proceedings, will sustain by the taking of his or their property. The provisions of Section 1856 relating thereto, are as follows:

"The Justice shall instruct the jury, in writing, in the following words:

"The defendant is entitled to recover damages in this case, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight and credibility of which you are the sole judges. The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made."

Under Section 1866, which is also a part of said Chapter 43, the form of the verdict to be returned is prescribed. Said Section reads as follows:

"We, the jury, find that the defendant (naming him) will be damaged, by the taking of his property for the public use, in the sum of————dollars."

Under Section 1867, which is also a part of said Chapter 43, the form of judgment to be rendered is prescribed, and the language of said section, in regard thereto, is as follows:

"Upon the return of the verdict, the Court shall enter a judgment as follows, viz:

"In this case the claim of (naming him or them) to have condemned certain lands named in the application, to-wit: (here describe the property), being the property of (here name the owner) was submitted to a jury com-

posed of (here insert their names) on the———day of———, A. D., ——, and the jury returned a verdict fixing said defendant's due compensation and damages at———dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs for which let execution issue.' J. P."

Section 1871 of said Code, which is also a part of said Chapter 43, authorizes an appeal to the Circuit Court from the finding of the jury of the special eminent domain

20 Court, by executing a bond, with sufficient sureties, payable to his adversary, in a penalty of \$300.00, conditioned to pay all costs that may be adjudged against it, which bond is required to be given within twenty days after the rendition of the verdict, but said section expressly provides that if the appeal be by the defendant, it shall not operate as a supersedeas, nor shall the right of the Complainant to enter in and upon the land of the defendant, and to appropriate the same to public use, be delayed. So much of said section as relates to this matter, reads as follows:

"Every party shall have the right to appeal to the Circuit Court from the findings of the jury in the special Court by executing a bond with sufficient sureties, payable to his adversary, in a penalty of three hundred dollars, conditioned to pay all costs that may be adjudged against him, which bond shall be given within twenty days after the rendition of the verdict, and may be approved by the justice. If the appeal be by the defendant, it shall not operate as a supersedeas, nor shall the right of the applicant to enter in and upon the land of the Defendant and to appropriate the same to public use be delayed. Upon appeals, the issues shall be tried de novo in the Circuit Court, which shall try and dispose of it as other issue, and enter all proper judgment."

Upon all such appeals to the Circuit Court, that Court has no jurisdiction, judicial power or authority under the

statutes of the State of Mississippi, as construed by the highest Court in that State, to hear, permit evidence upon, or determine the question of the right, authority, or necessity of the Western Union Telegraph Company to condemn for its telegraph line the right of way of a railroad company, or the question of obstruction or non-obstruction, interference or non-interference with the ordinary or common use, traffic, or travel on the railway company's railroad laid on such right of way, or the question of the dangerousness to persons or property, which would be caused by the construction, operation and maintenance perpetually of the telegraph company's line of poles, wires, cross-arms, fixtures, etc., on such railroad right of way as proposed, and said statutes exclude all judicial inquiry into or upon the questions aforesaid, as

21 well as to whether or not the right of way for which the condemnation is sought is public, or as to whether or not the telegraph line for the construction, operation and maintenance of which the condemnation is sought is a new or old line. But the jurisdiction on such appeal of the Circuit Court under said statutes, construed as aforesaid, is confined to the single question of reviewing the verdict of the jury before the Justice of the Peace as to the amount of damages that will be sustained by the railroad company, and such Justice of the Peace likewise under said statutes, construed as aforesaid, has and exercises no judicial power or authority in condemnation proceedings before him, but acts therein as a ministerial officer only.

XIII.

Complainant shows to the Court that although the said Western Union Telegraph Company, as hereinabove alleged and shown, had no right to condemn any portion of Complainant's right of way to its use, and although no eminent domain Court was created and given jurisdiction to act upon said several applications of the Western Union Telegraph Company to condemn Complainant's said right of way and bridges, or any part thereof, Defendant has, under the provisions of said Section 43 of the Code of Mississippi, obtained what purports to be judg-

ments of courts of eminent domain, condemning to the use of the Western Union Telegraph Company portions of the right of way and bridges of the Complainant, the Louisville & Nashville Railroad Company, and in and by said condemnation proceedings Complainant has been deprived of its property without due process of law in that its said property has been condemned without its having had an opportunity to be heard as to whether the use of the said property is so proposed to be taken is a public use, or as to whether the purpose for which said property is condemned is for the erection of a new line, or only for the maintenance of an existing line, or as to whether or

22 not said line is proposed to be constructed and placed so as not to be dangerous to persons and property, or so as not to interfere with the convenience of Complainant more than is unavoidable, or as to what interest Complainant had in its said property, all in violation of the Fourteenth Amendment to the Constitution of the United States, and Complainant here invokes the protection of the provisions of said Fourteenth Amendment, and claims the right, under the provisions thereof, to have the cloud placed upon its property, by said several alleged judgments of condemnation, removed.

XIV.

Complainant further shows to the Court that said proceedings, under which said alleged judgments were rendered, were void for the following reasons:

1.—Because they were not rendered by courts of eminent domain, constituted as provided by law.

2.—Because the property of the Defendant sought to be condemned was already devoted to public use, and was not subject to condemnation in said proceedings.

3.—Because the purpose for which said condemnation was sought was for the maintenance of an existing line, and not for the construction of a new line.

4.—Because the Defendant was not afforded an opportunity to be heard as to whether or not the construction of said new line would be dangerous to persons or property.

5.—Because the Defendant was not afforded an opportunity to be heard upon several questions.

6.—Because the Complainant was not afforded an opportunity to be heard as to whether said line would be constructed and placed so as not to interfere with the convenience of Complainant more than is unavoidable.

7.—Because the Defendant was not afforded an opportunity to be heard as to what was Defendant's interest in the property sought to be condemned.

23 And although said several proceedings, and the judgments rendered therein, violated the Fourteenth Amendment to the Constitution of the United States in said several particulars, the said Western Union Telegraph Company intends to, and will, enter upon and take possession of a portion of Complainant's said right of way and erect its line of posts and wires, and other appliances, thereon, and attach its posts and other appliances to Complainant's bridges, claiming the right to do so under said several proceedings and alleged judgments of condemnation, unless restrained from so doing by an injunction of this Honorable Court.

XV.

Complainant shows to your Honor that the Western Union Telegraph Company is, and has been for many years, engaged in doing a corporate telegraph and cable business in the Southern Division of the Southern United States Judicial District of the State of Mississippi, and it has, for many years, had and maintained offices and agents in said Division of said Judicial District.

By Section 9191 of the Code of Mississippi, it is provided as follows:

"Any corporation claiming existence under the laws of any other State or of any country foreign to the United States found doing business in this State shall be subject to suit here to the same extent that corporations of this State are, by the laws thereof, liable to be sued by any

resident of this State, and also so far as relates to any transaction had in whole or in part within this State, or any cause of action arising here. And any corporation having any transaction with persons or having any transaction concerning property situated in this State, through any agency whatever, acting for it within this State, shall be held to be doing business here within the meaning of this section."

By Section 920, it is provided that, "Process may be served upon any agent of said corporation found within the County where the suit is brought, no matter what character of agent such person may be."

XVI.

The Complainant states that it is and has been for a great many years a common carrier by railroad engaged in interstate commerce as well as intrastate commerce in the State of Mississippi and among that State and other States of the United States, subject to the Act of Congress to regulate commerce, approved February 4, 1887, and the Amendments thereto, and its system of railroads located in Mississippi and outside of that State are military and post roads within the true intent and meaning of the Act of Congress, approved June 15, 1866 (Sec. 5258 U. S. Compiled Statutes 1901), and the Act of Congress, approved June 8, 1872 (Sec. 3964, U. S. Compiled Statutes, 1901), which authorized and empowered every railroad operated by steam, as Complainant's said railroads were then, have been ever since, and are now, to carry freight, passengers, troops, Government supplies, mails and property on their way from one State to another State, and to receive compensation therefrom, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination, and which acts were enacted under the powers vested in Congress to establish post roads and to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had

previously existed and to prevent such trammels in the future and were intended among other objects and purposes to reach trammels by State enactments.

The Complainant further states that under the Act of Congress entitled "An act to aid the construction of telegraph lines and to secure to the Government the use of same for postal, military and other purposes," approved July 24, 1866 (Secs. 5263-5269, inclusive, U. S. Compiled Statutes, 1901), and the amendments thereto, the restrictions and obligations of which act Complainant has heretofore duly accepted in writing and filed the same with the Postmaster General in accordance with the provisions thereof, and under its charter as amended it is, and has been, since a date long prior to the institution of the Defendant Western Union Telegraph Company's said condemnation proceedings, authorized and empowered in

25 accordance with the laws of the State of Kentucky and other States, including the State of Mississippi, to own, construct, control, operate, and maintain telegraph and telephone lines, on, over, and along its railroad right of way not only for the conduct of its own railroad business, but commercially, as a common carrier of messages, news, intelligence, and information for the public at large, and the receipt and delivery thereof, for just and reasonable compensation or hire in all of said States, as provided by the laws thereof, and by virtue of the last mentioned act it has the right and is duly authorized and empowered to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, and with their consent, along of the military or post roads of the United States (including its own) which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States, provided that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

The Complainant further states that the Statutes of Mississippi are in contravention of Sub-Section 3, Section 8, Article 1 of the Constitution of the United States granting complete and exclusive power to Congress to regulate

commerce among the several States, and the operation of said statutes lays a burden upon such commerce and the instrumentalities thereof such as Complainant's said railroads in the State of Mississippi and other States connected with each other so as to form continuous lines for the transportation of passengers, troops, Government supplies, mail, freight and property on their way from one State to another, owned, used, operated and maintained by Complainant, on, along or over the right of way of its said railroad employed in such commerce, and said statutes amount to and operate as a regulation of commerce among the several States, and materially and substantially trammel, obstruct, and interfere with such commerce, and are in conflict with the provisions of the Acts
 26 of Congress, approved June 15, 1866, July 24, 1866, and June 8, 1872, hereinabove referred to, and are, therefore, unconstitutional and void.

PRAYER.

To the end, therefore, that Complainant may have the relief which it can only obtain in a Court of Equity, and that the Defendant may answer the premises, but not upon oath or affirmation, an answer under oath being here expressly waived by the Complainant, the Complainant now prays the Court that it will make an order directing that service of process may be had upon the Defendant, the Western Union Telegraph Company, by serving the same upon any of its agents, conducting any portion of its business within the Southern Division of the Southern District of the State of Mississippi, and that process, in due form of law, according to the rules and practice of this Honorable Court, may issue against the said Western Union Telegraph Company, requiring it to appear and plead to the several allegations of this bill of complaint, within the time prescribed by the rules of equity in Federal Courts.

May it please the Court to further grant to Complainant a restraining order against the Defendant, the Western Union Telegraph Company, restraining and enjoining it, from entering or erecting its poles, wires or other fixtures upon any portion of Complainant's said right of way,

hereinabove described as having been condemned to its use by the Western Union Telegraph Company, and from attaching its poles or other structures to Complainant's bridges or any of them, until a motion by Complainant for an injunction pendente lite. against the use of any portion of said right of way or bridges by said Western Union Telegraph Company, can be heard and determined.

27 Complainant further prays that your Honor will be pleased to grant it an injunction restraining the said Western Union Telegraph Company, during the pendency of this suit, from entering upon or using, otherwise than under existing contract between Complainant and Defendant, any portion of Complainant's said right of way or bridges hereinabove described, for the purpose of erecting, continuing or maintaining its telegraph poles, wires and other fixtures, and from attaching its poles, wires or other parts of its line, to Complainant's bridges, or any of them, until this cause is finally heard and determined.

Complainant further prays that at the hearing of this cause your Honor will be pleased to decree that the said several proceedings, for the condemnation, by the Western Union Telegraph Company, of parts of the right to attach its poles, wires, or other parts of its line to Complainant's bridges, or any of them, may be held null and void as violative of the Fourteenth Amendment to the Constitution of the United States, as well as for the other reasons assigned in the bill of complaint, and this Honorable Court will be pleased to decree said several condemnation proceedings, and the several judgments rendered therein, to be void and of no effect, and that it will permanently enjoin the said Western Union Telegraph Company from entering upon, taking possession of, or erecting any of its wires, or other appliances upon Complainant's said right of way, and from attaching to Complainant's bridges, or to any of them, the said Western Union Telegraph Company's poles, wires, or other parts of its said telegraph line, after the termination, by notice or otherwise, of the contract under which it now occupies said right of way with its telegraph line.

28 State of Kentucky.
County of Jefferson.

M. H. SMITH.

(Seal.)

EXHIBIT "A."

In the Matter of:

VS.

No.——.

To the Clerk of the Circuit Court of said County:

Your Petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and or-

ganized for the purpose and object of owning, using, operating and maintaining lines for the electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the States of New York into and through other States, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the State of Mississippi, to points without said State, owning and operating lines for telegraphing in said States, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, and maintain and operate for the purposes aforesaid, a line of poles with cross-arms and wires thereon, within the State of Mississippi, and in and through the County of Harrison, along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operating said Railroad by virtue of a lease from the New Orleans, Mobile & Texas Railroad Company, as re-organized, which is a corporation of the State of Alabama, domiciled, as petitioner is informed and believes, at Mobile, in said State; from a point on the said right of way on the line dividing the Counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the Defendant Railroad Company spanning said Bay of Biloxi on the east, and thence extending westwardly through the County of Harrison to the dividing line between said County and Hancock County on the west, which is a point in the middle of the Bay of St. Louis and on the bridge of the Defendant Railroad Company spanning said Bay of St. Louis, being a distance of thirty miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting with those portions of the bridges over the Bay of Biloxi and over the Bay of St. Louis a continuous strip of track about thirty miles long, extending from the Jackson

County line on the east to the Hancock County line on the west, and being the right of way over which the main line of said defendants between New Orleans and Mobile is now constructed and being operated. And
 30 it is further the desire and intention of petitioners to condemn the right to attach poles, cross-arms and wires above set forth, to such portions of the bridges above mentioned as lie within said Harrison County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and in no wise hamper, impede, obstruct, or interfere with the use thereof by said defendants, and others who may be authorized to use same.

The said line of poles, cross-arms and wires to be constructed, and for which this condemnation is sought, being a new line.

That it is the purpose of your petitioners to erect one line of poles with cross-arms and wires and upon said right of way and bridges of said defendants and in such manner and at such distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridge included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross-arms thereon and string wires for use in telegraphing as aforesaid, and petitioner purposes to maintain and repair the same as may from time to time be necessary, and to erect and maintain only one line of poles with cross-arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position,
 31 the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be

the best, and the said line to be constructed upon the most approved plan known, or in use in this county.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross-arms placed thereon and wires strung, your petitioner will, at its own expense upon reasonable notice from said defendants, remove said poles, cross-arms and wires to such other point, or points, on said defendants' right of way as shall be designated by said defendants.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be condemned, and all it seeks in this proceeding to condemn is, an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants, so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your

32 petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed, that the Farmers Loan and Trust Company, which is a corporation of the State of New York, domiciled in the City and State of New York, is

the trustee in certain mortgages executed by the other defendants herein, to-wit—the New Orleans, Mobile and Texas Railroad Company, as re-organized, and the Louisville and Nashville Railroad Company, for the purpose of securing certain bonds executed and issued by the said Defendant Railroad Companies the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of the application to the Clerk of the Circuit Court of Harrison County, he shall indorse thereon his application of a competent Justice of the Peace of said County to constitute with a jury, a Special Court of Eminent Domain, and shall fix the 27th day of December, A. D. 1911, as the time and the Court House of the said County, in the City of Gulfport, as the place in said County for the organization of said Court, and he shall issue a summons directed to the Sheriff of said County, commanding him to summons the defendants, the Louisville and Nashville Railroad Company, and that he shall issue process by publication as required by law as in the

33 case of non-residents for the said defendants, the New Orleans, Mobile and Texas Railroad Company as re-organized, and the Farmers Loan and Trust Company, and shall also post a copy of said process on the premises and at the door of said Court House in said County, commanding them to appear at the time and place designated, and also a summons to the Justice of the Peace named by him to also appear at said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the Circuit Court of said County the names of eighteen jurors to serve as part of said Court, and issue a Venerie Facias to the Sheriff of said County, commanding him to summon jurors as drawn to appear at the time and place designated, to constitute with said Justice of the Peace, a Special Court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendant's railroad.

HARRIS & POTTER,
BOWERS & GRIFFITH,
Attorneys for Petitioner.

34 The State of Mississippi,
 Harrison County.

Personally appeared before me the undersigned authority in and for said County and State, L. K. McNees, who being by me first duly sworn, deposes and says that he is the Manager of the Western Union Telegraph Company at Gulfport, Mississippi, and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES.

Sworn to and subscribed before me, this the 24th day of Nov., 1911.

(seal)

S. A. TOMLINSON,
Notary Public.

(Indorsed): State of Mississippi, Harrison County. Western Union Telegraph Company vs. Louisville & Nashville Railroad Company, et als. Petition for Condemnation. Filed, November 24, 1911. A. J. Ramsay, Clerk. By A. J. Ramsay, Jr., D. C. Harris & Potter, Bowers & Griffith, for Petitioners.

Summons and venire facias issued this Nov. 24, 1911. Summons by publication issued to Defendants, returnable before H. D. Moore, J. P., on Dec. 27th, 1911, published in Gulfport, Miss., at post office, Nov. 24th, 1911, postage prepaid, addressed to defendants, as follows: Farmers Loan & Trust Company, New York City, New York, and New Orleans, Mobile & Texas Railroad Company, Mobile, Ala.

35

A. J. RAMSAY, Clerk.
By A. J. RAMSAY, JR., D. C.

State of Mississippi,
Harrison County.

I, A. J. Ramsay, Clerk of the Circuit Court of said County and State, hereby certify that the foregoing pages contain a true, correct and complete transcript of the petition for condemnation, filed on November 24th, 1911, in the case of the Western Union Telegraph Company vs. Louisville & Nashville Railroad Company, et als., to-

gether with the indorsements thereon, as the same appears and remains of record and on file in the archives of my office.

Given under my hand and official seal of said Circuit Court hereto affixed, at office in Gulfport, Miss., this the 13th day of December, 1911.

Clerk Circuit Court, Harrison Co.

By _____

Deputy Clerk.

36

EXHIBIT "B."

The State of Mississippi,
Jackson County.

In the Matter of:

The Western Union Telegraph Company,

vs.

No. _____

The Louisville & Nashville Railroad Company, The New Orleans, Mobile & Texas Railroad Company, as Re-Organized, The Farmers Loan & Trust Company.

PETITION FOR CONDEMNATION.

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, and using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the State of New York into and through other States, including the State of Mississippi; that it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside the State of Mississippi, to points without said State, owning and operating lines for telegraphing in said States, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purposes aforesaid, a line of poles with cross-arms and wires thereon, within the State of Mississippi, and in and through the County of Jackson along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operating

37 said railroad by virtue of a lessee from the New Orleans, Mobile & Texas Railroad Company, as re-organized, which is a corporation of the State of _____, domiciled, as petitioner is informed and believes, at _____, in said State; from a point on the right of way of said railroad company on the dividing line between the States of Alabama and Mississippi near Pecan station on the east, thence extending through the County of Jackson to the dividing line separating the Counties of Jackson and Harrison in the State of Mississippi, which said dividing line is in the middle of the Bay of Biloxi and is a point on the bridge of the said Louisville & Nashville Railroad Company which spans said Bay of Biloxi between Ocean Springs on the east and Biloxi on the west, being a distance of twenty-two miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting, together with that portion of the bridge over the Bay of Biloxi, lying in Jackson County and the bridges over the east and west Pascagoula river, the right of way of the said railroad company lying in Jackson County, Miss., and extending from the Alabama line on the east to the Harrison County line on the west, being the right of way over which the main line of said defendant between New Orleans and Mobile is now constructed and operated. And it is further the desire and intention of petitioners to condemn the right to attach the poles, cross-arms and wires as above set forth, to such portions of the bridges above mentioned as lie within said Jackson County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and in no wise hamper, impede, obstruct or interfere with the use thereof by said defendants, and others who may be authorized to use same.

The said line of poles, cross-arms and wires to be constructed, and for which this condemnation is sought, being a new line.

38 That it is the purpose of your petitioners to erect one line of poles with cross-arms and wires along and upon said right of way and bridges of said defendants, and in such manner and at such distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross-arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary, and to erect and maintain only one line of poles with cross-arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross-arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purposes to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross-arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove

39 said poles, cross-arms and wires to such other point or points, on said defendants right of way as shall be designated by said defendants.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be condemned, and all it seeks in this proceeding to condemn is an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such a way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceedings to condemn, and said defendants so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has filed [failed] to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its line along and across the right of way of said defendants, and the right of way sought to be condemned in the proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Co., which is a corporation of the State of New York, is the Trustee in certain mortgages executed by the other defendants herein, to-wit, the New Orleans, Mobile & Texas Railroad Company, as re-organized, and the Louisville & Nashville Railroad Company, for the purpose of securing certain bonds executed and issued by the said defendant railroad companies the said mortgages covering all of the property of the said defendants
 40 in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Jackson County, he shall indorse thereon his appointment of a competent Justice of the Peace of said County to constitute with a jury a special Court of eminent

domain, and shall fix the 10th day of January, 1912, as the time, and the Court House of the said County, in the Town of Pascagoula, sometimes called Scranton, as the place in said County for the organization of said Court, and he shall issue a summons directed to the sheriff of said County, commanding him to summon the defendants, the Louisville & Nashville Railroad Company, and that he shall issue process by publication as required by law in the case of non-residents for the said defendants, the New Orleans, Mobile & Texas Railroad Company, as re-organized, and the Farmers Loan & Trust Company, and shall also post a copy of said process on the premises and at the door of said Court house in said County, commanding them to appear at the time and place designated, and also a summons to the Justice of the Peace named by him, to also appear at said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the Circuit Court of said county the names of 18 jurors to serve as a part of said Court, and issue a venire facias to the sheriff of said county, commanding him to summon said jurors as drawn to appear at the time and place designated, to constitute with said Justice of the Peace a special Court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendants railroad.

HARRIS & POTTER,
BOWERS & GRIFFITH,
Attys. for Petitioner.

41 The State of Mississippi,
 Harrison County.

Personally appeared before me the undersigned authority in and for said county and state, L. K. McNees, who being by me first duly sworn deposes and says that he is the Manager of the Western Union Telegraph Company, at Gulfport, Miss., and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES,

Sworn to and subscribed before me this the 2nd day of November, 1911.

F. H. TOMLINSON, N. P.

EXHIBIT "C".

In the Matter of:

The Western Union Telegraph Company,

vs.

No.

The Louisville & Nashville Railroad Company, The New Orleans, Mobile & Texas Railroad Co., as re-organized. The Farmers Loan & Trust Company.

Petition for Condemnation.

The State of Mississippi,
Hancock County.

To the Clerk of the Circuit Court of said County:—

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, using, operating, and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the State of New York, into and through other states, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the State of Mississippi, to points without said State, owning and operating lines for telegraphing in said States, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purpose aforesaid, a line of poles with cross-arms and wires thereon, within the State of Mississippi, and in and through the county of Hancock along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operating said railroad by virtue of a lease from the New Orleans, Mobile & Texas R. R. Co., as re-organized, which is a corporation of the State of Alabama, domiciled, as petitioner is informed and believes, at Mobile, in said State; from a point on said right of way, on the dividing

line between the Counties of Hancock and Harrison on the bridge crossing the Bay of St. Louis on the east, and thence extending through the County of Hancock to the thread of the stream of East Pearl river, which is the western boundary of the State of Mississippi, separating same from the State of Louisiana, being a distance of 17 miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. The said right of way being about 100 feet wide and constituting, together with that portion of the bridge over the Bay of St. Louis, lying in Hancock County and that portion of East Pearl river lying in the State of Mississippi, one continuous and contiguous strip or body of land and tract, extending from the Harrison County line on the east to the Louisiana line on the west, and being the right of way over which the main line of said defendants, between New Orleans and Mobile is now constructed and being operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross-arms and wires as above set forth, to such portion of the bridges above mentioned as lie within said Hancock County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges and in no wise hamper, impede obstruct or interfere with the use thereof by said defendants and others who may be authorized to use same.

The said poles, cross-arms and wires to be constructed, and for which this condemnation is sought, being a new line.

That it is the purpose of your petitioners to erect one line of poles with cross-arms and wires along and upon said right of way and bridges of said defendants and in such manner and at such distance from the tracks of said

44 defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for

any other purpose than to erect poles with cross-arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary and to erect and maintain only one line of poles with cross-arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be surely and properly braced, and said cross-arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of its tracts, or construct new tracts, or side tracts, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross-arms placed thereon and wires strung, your petitioner will, at its own expense upon reasonable notice from said defendants, remove said poles, cross-arms and wires to such other point, or points, on said defendant's right of way as shall be designated by said defendant.

45 Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be condemned, and all it seeks in this proceeding to condemn, is an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such a way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants, so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner

has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of the laws of the state of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Co., which is a corporation of the State of New York, is the Trustee in certain mortgages executed by the other defendants herein, to-wit, the New Orleans, Mobile & Texas R. R. Co., as re-organized, and the Louisville & Nashville Railroad Company for the purpose of securing certain bonds executed and issued by the said defendant Railroad Companies the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

46 Premises considered, petitioner prays that upon the presentation of application to the Clerk of the Circuit Court of Hancock County he shall indorse thereon his appointment of a competent Justice of the Peace of said county to constitute with a jury, a special Court of eminent domain, and shall fix the 8th day of January, A. D. 1912, as the time, and the Court house of the said county, in the city of Bay St. Louis, as the place in said county for the organization of said Court, and he shall issue a summons directed to the Sheriff of said County, commanding him to summon the defendants, the Louisville & Nashville R. R. Co., and that he shall issue process by publication as required by law as in the case of non-residents for the said defendants, the New Orleans, Mobile & Texas R. R. Co., as re-organized, and the Farmers Loan & Trust Co., and shall also post a copy of said process on the premises and at the door of said Court house in said county, commanding them to appear at the time and place designated and also a summons to the Justice of the Peace named by him, to also appear at said time

and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the Circuit Court of said county the names of eighteen jurors to serve as part of said Court and issue a venire facias to the Sheriff of said county, commanding him to summons jurors as drawn to appear at the time and place designated, to constitute with the said Justice of the Peace, a special Court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendants railroad.

HARRIS & POTTER,
BOWERS & GRIFFITH,
Attorneys for Petitioners.

47 The State of Mississippi,
 Harrison County.

Personally appeared before me the undersigned authority in and for the said State and County, L. K. McNeese, who being by me first duly sworn, deposes and says that he is the Manager of the Western Union Telegraph Company, at Gulfport, Miss., and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEESE,

Sworn to and subscribed before me this the 24th day of Nov., 1911.

(Seal)

S. A. TOMLINSON, N. P.

The State of Mississippi.
Hancock County.

I, W. W. Stockstill, Clerk of the Circuit Court of the County and State aforesaid, hereby certify that the foregoing six pages contain a true and correct copy of the petition of the Western Union Telegraph Company for condemnation against the Louisville & Nashville Railroad Company, et als., now on file in my office.

Given under my hand and official seal, this the 12th day of December, A. D. 1911.

(Seal)

W. W. STOCKSTILL,
Circuit Clerk.

State of Mississippi,
Jackson County.

In the Matter of:

The Western Union Telegraph Company,

vs.

No.

The Louisville & Nashville Railroad Company, The New
Orleans, Mobile & Texas Railroad Co., as re-organized,
The Farmers Loan & Trust Co.

Petition for Condemnation.

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the State of New York, into and through other States, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the State of Mississippi, to points without said States, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purpose aforesaid, a line of poles with cross-arms and wires thereon, within the State of Mississippi, and in and through the County of Jackson along the right of way of the Louisville & Nashville railroad, from a point on the right of way of said railroad company on the dividing line between the States of Alabama and Mississippi near Pecan station on the east, thence extending through the County of Jackson to the dividing line separating the Counties of Jackson and Harrison in the State

49 of Mississippi, being a distance of twenty two miles, more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting the right of way of said railroad company, lying in Jackson County, Mississippi, and extending from the Alabama line on the east to the Harrison county line on the west, being the right of way over which the main line of said defendants between New Orleans and Mobile is now constructed and being operated. It is not the desire or intention of petitioner to condemn the use of any of the bridges of the Louisville & Nashville Railroad Co., lying and being in Jackson County, Miss., and petitioner expressly disclaims and abandons any intention or purpose of condemning or using any of said bridges.

The said line of poles, cross-arms and wires to be constructed, and for which this condemnation is sought, being a new line. That it is the purpose of your petitioners to erect one line of poles with cross-arms and wires along and upon said right of way of said defendants and in such manner and at such distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross-arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary and to erect and maintain only one line of poles with cross-arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner
 50 as to hold firmly in position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about

four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, or any other legitimate railroad use, and for such purpose to use and occupy that portion of right of way on which petitioner's poles are, or may be set, cross-arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross-arms and wires to such other point, or points, on said defendants right of way as shall be designated by said defendants. And if at any time said railroad company shall require in the manner and for the purposes aforesaid, its entire right of way, at any point where the petitioner's line may be constructed on its right of way, the petitioner will at such point, or points, remove its line entirely off of said right of way at its cost and expense, upon being given reasonable notice thereof, in writing.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way sought to be condemned, and all it seeks in this proceeding to condemn is an easement over same for the construction, operation, maintenance and repair of its lines, the said easement to be used now and in the future in such a way as to not interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desired by this proceeding to condemn, and said defendants, so far as your
 51 petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue

of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Co., which is a corporation of the State of New York, domiciled in the City and State of New York, is the Trustee in certain mortgages executed by the other defendants herein, to-wit, the Louisville & Nashville R. R. Co., for the purpose of securing certain bonds executed and issued by the defendant railroad companies, the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Jackson County, he shall indorse thereon his appointment of a competent Justice of the Peace of said County, to constitute with a jury, a special Court of eminent domain, and shall fix the 10th day of January, 1912, as the time, and the Court house of the said county in the town of Pascagoula, sometimes called Scranton, as the place in said county for the organization of said Court, and he shall issue a summons directed to the Sheriff of said county, commanding him to summon the defendants, the Louisville & Nashville R. R. Co., and he shall

52 issue process by publication as required by law in the case of non-residents for the said defendants, The Farmers Loan & Trust Co., and shall also post a copy of said process on the premises and at the door of said Court house in said county, commanding them to appear at the time and place designated, and also a summons to the Justice of the Peace named by him, to also appear at the said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the Circuit Court of said County the names of eighteen jurors to serve as part of said Court, and issue a venire facias to the Sheriff of said county, commanding him to summons jurors as drawn to appear at the time

and place designated, to constitute with said Justice of the Peace, a special Court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendants railroad.

HARRIS & POTTER,
BOWERS & GRIFFITH,
Attorneys for Petitioner.

The State of Mississippi,
Harrison County.

Personally appeared before me the undersigned authority in and for said county and state, L. K. McNees, who being by me first duly sworn deposes and says that he is the manager of the Western Union Telegraph Company, at Gulfport, Mississippi, and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES,

Sworn to and subscribed before me this the 20th day of November, 1911.

F. H. TOMLINSON, N. P.
Notary Public.

53 Following appears on back: Original Bill.
Filed Apr. 27th, 1912.

54 United States of America, Southern Division of
the Southern District of Mississippi.

Louisville & Nashville Railroad Company.

vs.

Western Union Telegraph Company.

To the Honorable Henry C. Niles, Judge for said District:

The undersigned would respectfully show that he is the sole attorney representing the defendant in the above stated cause; that an appeal was taken by the plaintiff to the Supreme Court of the United States from a decree rendered by your Honor in said cause, dismissing the bill

of complaint herein for want of jurisdiction, and that recently the Supreme Court reversed the said decree and remanded the cause, but that the mandate was not filed in this Court until about the first day of August, the present month; and he would further show that at the time of filing of said mandate and for some time prior thereto, and since that time, he has been very sick, so much so as to be unable to attend to business, being confined to his bed for the greater part of the time, and that by reason of said illness, he has been unable to file the answer, or make other defense for the said defendant:

The undersigned would show further that the failure to file answer or make other defense, was not due to any want of diligence on his part, but for the reasons above set forth.

The undersigned therefore, on behalf of said defendant, for the cause above shown, respectfully requests that the time for filing said answer or making other defense be extended until ten days from the filing of the order.

Respectfully submitted,

J. B. HARRIS,
Atty, for Defendant.

Following appears on back:

The Louisville & Nashville R. R. Co., vs. The Western Union Tel. Co., Application of defendant for enlargement of time to answer.

Defendant admits the allegations of paragraphs three and four of said bill of complaint.

IV.

Defendant denies that it was its purpose by virtue of said eminent domain proceedings to obtain the right to continue the use of Complainant's right of way for the maintenance of an existing line of poles and wires thereon, and avers that it was and is its intention to construct a new line as is shown by the applications in said condemnation proceedings which are filed as exhibits "A", "B", and "C", and made a part of the bill of complaint herein.

V.

Defendant admits the allegations of paragraphs six, seven and eight of said bill of complaint.

VI.

The defendant admits that it is provided by Chapter 43 of the Code of Mississippi that authority is conferred upon the Clerks of the several Counties to appoint competent Justices of the Peace to serve as part of the special Court of eminent domain, but the defendant avers that by the laws of the State of Mississippi, power is conferred upon Deputy Clerks to perform all the powers and duties which are conferred upon the Clerks and that all acts done by the Deputy Clerks are in all respects as valid and binding as if done by the clerk. Defendant also admits that Chapter 43 authorizes and empowers the Clerks of Circuit Courts to appoint Justices of the Peace, and provides that the appointments shall be indorsed upon the applications for the condemnation proceedings; but the Defendant denies that an appointment made as alleged in the bill of complaint in writing upon separate sheets of paper in any way invalidates the proceeding, and that such has been expressly decided by the Supreme Court of the State of Mississippi as will hereafter be more fully set forth. The Defendant denies that the condemnation proceedings had in Hancock, Harrison and Jackson Counties are void because the appointments of the Justices of the Peace were not indorsed upon the applications, and denies that they are void because the ap-

po ntments were made by the deputy Clerks and not by the clerks, as averred in paragraph nine of said bill of complaint, but avers that the said applications and appointments were properly presented and made.

VII.

Defendant denies that the laws of the State of Mississippi do not confer the power upon telegraph companies to subject to the right of eminent domain the property which has already been devoted to a public use. On the contrary, the Defendant avers that it has been expressly decided by the Supreme Court of the State of Mississippi, construing the statutes on the subject, that such power is conferred upon telegraph companies, particularly for condemnation of rights of ways of railroad companies.

VIII.

Defendant admits that Sections 925 and 929 Code of Mississippi, 1906, confer upon it the rights claimed by it to condemn the right of way and bridges of Complainant in accordance with the provisions of Chapter 43 of said Code of Mississippi of 1906, and defendant admits that Section 925 of the Code of Mississippi, authorizes all companies and associations incorporated and organized for the purpose of constructing telegraph and telephone lines to construct the same and set up and erect their posts and fixtures along and across any of the public highways, streets, waters, and along and across all turnpikes and railroads, and admits that said Section 925 does not confer upon the said Defendant the power of condemnation, but that

58 said right of condemnation is conferred upon the said defendant by Section 929 of the Code of Mississippi, of 1906, and defendant avers that by reason of said Section, it had the right to condemn the right of way of railroad companies, including the Complainant, without their consent. In addition to the rights conferred upon the Defendant by the sections of the statutes of the State of Mississippi above referred to, the Defendant would show that long prior to the institution of the condemnation proceedings which are the subject of this

suit, the Defendant had accepted in writing and filed with the Postmaster General in accordance with the provisions thereof an act to aid in construction of telegraph lines and secure to the Government the use of the same for postal and military purposes, approved July 24th, 1866, and amendments thereto, whereby it was authorized to construct, control, operate and maintain telegraph lines over and along any of the military and post roads of the United States and along and across navigable streams or waters of the United States, etc. A certified copy is herewith filed as Exhibit "A" to this answer.

Defendant admits that Section 929 gave telephone and telegraph companies the power to exercise the right of eminent domain as provided by Chapter 43 of the Code of Mississippi, 1906, for the purpose of constructing new lines, and did not give the right to telegraph and telephone companies of eminent domain for the continuance or maintenance of any existing line, and Defendant denies that in instituting said condemnation proceedings, it was not its purpose to erect a new line, as was required by law, but avers that it was and is its purpose to erect a new line as is shown by the applications which are made parts of the bill of complaint and which are here referred to, and that it did not ask and did not obtain any right to maintain an existing line, and that it is not its purpose by virtue of said proceedings to undertake to maintain an existing line, but to erect a new line in accordance with the terms of the applications and judgments based thereon.

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IX.

Defendant admits the allegations contained in paragraph twelve of the bill of complaint, but it submits that, although the said allegations are true, they do not confer upon the Complainant the right to maintain this action, or render the judgments in the condemnation proceedings void, or entitle Complainant to the relief sought.

X.

Defendant admits that it has under the provisions of Section 43 of the Code of 1906, obtained judgments in a

Court of eminent domain condemning to its use the right of way and bridges of Complainant, but it denies that the Complainant has been deprived in any way of its property without due process of law, but avers that such judgments were obtained in properly and legally organized and created eminent domain Courts with jurisdiction to act upon said applications as provided by the laws of the State of Mississippi, and that the said condemnation proceedings and judgments rendered therein are not void nor in violation of any provisions of the Fourteenth Amendment to the Constitution of the United States, as alleged in said paragraph thirteen of said bill of complaint.

XI.

Defendant denies that the said condemnation proceedings and the judgments rendered therein are void for any of the reasons set up in paragraph fourteen of the bill of complaint, and denies that the said condemnation proceedings and judgments rendered therein are violative of the Fourteenth Amendment to the Constitution of the United States in particulars alleged or in any particular.

Defendant admits that it does intend to enter upon and take possession of that portion of Complainant's right of way embraced in the said condemnation proceedings and under the judgments rendered therein.

XII.

Defendant admits the allegations of paragraph fifteen of the bill of complaint.

XIII.

Defendant is advised and believes it to be true that the Complainant is a common carrier engaged in interstate commerce as well as in intrastate commerce in the State of Mississippi, and that the said Complainant is subject to the Act of Congress to regulate commerce as set forth in the first section of paragraph sixteen of said bill of complaint.

Defendant is not advised as to the facts set forth in the second section of said paragraph sixteen of said bill of complaint, but the said defendant submits, admitting the allegations in the said two sections of said paragraph to be true, they do not entitle the Complainant to maintain this action nor render the said condemnation proceedings and judgments rendered therein void, or entitle Complainant to the relief sought.

Defendant denies that the statutes of the State of Mississippi in reference to eminent domain and conferring the power of condemnation upon this Defendant are in contravention of sub-section 3, section 8, article 1, of the Constitution of the United States, or that the said statutes and condemnation proceedings and the judgments had thereunder which are attacked in this cause in any way trammel, obstruct or interfere with the Act of Congress of June 15, 1866, July 24, 1866, or June 8, 1872, or in conflict or in violation of any provision of the Constitution of the United States of [or] any Act of Congress.

XIV.

Further answering, the Defendant would show that after filing the bill of complaint in this cause, to-wit, on the 16th day of August, 1912, the Complainant filed in the Chancery Court of Jackson County, State of Mississippi, a bill of complaint, practically identical in all substantial particulars, with the bill of complaint in this cause, attacking the said condemnation proceedings and

61 judgments rendered therein as being void upon the several grounds set up in the bill of complaint in this cause, praying an injunction against the Defendant, from entering upon the right of way of the Complainant by virtue of the said condemnation proceedings, and an ex parte injunction pendente lite was granted; that afterwards, the Defendant appeared in vacation and filed in said Chancery Court of Jackson County, Mississippi, a motion to dissolve the said injunction for want of equity on the face of the bill, and that said motion to dissolve, upon the hearing by the Chancellor, was overruled, and the Defendant prayed and

obtained an appeal to the Supreme Court of the State of Mississippi, from said interlocutory decree, dissolving the injunction, according to the practice of the State of Mississippi, to settle the principles of the cause, the effect of said motion to dissolve and the said appeal being to bring before the Supreme Court of Mississippi, a consideration of the merits of the cause, as set forth in the bill of complaint; that afterwards, the said cause was heard in the Supreme Court of the State of Mississippi, and the decree of the Chancellor overruling the motion to dissolve the injunction was reversed and the injunction dissolved by the said Supreme Court of the State of Mississippi, and each and every question raised in this cause upon the merits of the controversy, was decided by the Supreme Court of Mississippi, adversely to Complainant.

A certified copy of the transcript submits that the Complainant in this cause, having sought the jurisdiction of the State Court, and obtained adjudication on the points involved on the merits in this cause, that it is bound by the decision of the Supreme Court of the State of Mississippi, and that the same is the law of this case, and is res adjudicata of the questions raised
 62 in this case by the said Complainant, especially all questions arising on the construction and interpretation of the local statutes of the State, and Defendant therefore prays, that in consideration of the premises, the said bill be dismissed.

And, having fully answered, the Defendant prays to be hence dismissed with its reasonable costs.

THE WESTERN UNION
 TELEGRAPH CO.,
 By J. B. HARRIS,

Atty. for Defendant.

Following appears on back:

Answer to the original bill Filed Aug. 19th, 1914.

63

EXHIBIT "A".

Post Office Department.
Washington.

September 16, 1913.

I, A. S. Burleson, Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance filed June 8, 1867, in this Department. .

In testimony whereof I have set my hand, and caused the seal of the Post Office Department to be affixed, at the City of Washington, the day and year above written.

[Seal]

A. S. BURLESON,
Postmaster General.

Western Union Telegraph Company.

Meeting of the Board of Directors at the Executive Office.

145 Broadway, New York,
June 5th, 1867.

Resolved, That this Company does hereby accept the provisions of the Act of Congress entitled "An Act to aid in the Construction of Telegraph Lines, and to secure to the Government the use of the same for postal, military, and other purposes", approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the Secretary be and is hereby authorized and directed to file this resolution with the Postmaster General of the United States, duly attested by the signature of the Acting President of the Company, and the seal of the corporation in compliance with the fourth section of said Act of Congress.

Adopted unanimously,

HIRAM SIBLEY,
Acting President.
WESTERN UNION TELE-
GRAPH CO.,
O. H. PALMER,
Secy. W. U. T. Co.

[Western Union
Seal
Telegraph Co.]

Following appears on back:
Ex. "A" to Ans.

64

"EXHIBIT "B".

Louisville & Nashville Railroad
vs. No. 3144.
Western Union Telegraph Company.
Chancery Court, Jackson County,
In Vacation.

Nov. 6, 1912.

Decree overruling motion to dissolve injunction rendered by Hon. J. M. Stevens, Chancellor of Eighth District at Hattiesburg, Mississippi, November 6th, 1912.

* * * * *

65

ORIGINAL BILL OF COMPLAINT.

Filed August 16th, 1912.

To the Chancery Court of the County of Jackson in the State of Mississippi:

The Louisville & Nashville Railroad Company, a corporation created by, and organized under, the laws of the State of Kentucky, and having its principal place of business in the City of Louisville, in the State of Kentucky, brings this, its bill of complaint against the Western Union Telegraph Company, a corporation created by, and organized under, the laws of the State of New York and having its principal place of business in the City of New York, in the State of New York, and shows to the Court that;

I.

Complainant is a railroad corporation and owns and operates, and has for many years, owned and operated a railroad track and right of way, extending from the City of Mobile, in the State of Alabama, to the City of New Orleans, in the State of Louisiana, Complainant's

said track crosses several navigable streams in the Counties of Jackson, Harrison and Hancock, in the State of Mississippi, by means of bridges and said right of way, bridges and track extend from the dividing line between the State of Alabama and the State of Mississippi, through said Counties of Jackson, Harrison and Hancock in the State of Mississippi, to the dividing line between the State of Mississippi and the State of Louisiana. Complainant is engaged in the business of a common carrier of interstate and intrastate commerce in the State of Mississippi, and between the State of Mississippi and other states of the United States, and in conduct of its said business it operates, and has for many years operated daily, engines and trains of cars over its said right of way, bridges and track.

66

II.

The said right of way, bridges and tracks formerly belonged to the New Orleans, Mobile & Texas Railroad Co., as recognized, but in 1881, complainant purchased from said New Orleans, Mobile & Texas Railroad Company, as recognized, all the said railroad property belonging to it, and received a duly executed conveyance thereof, and has for more than twenty years owned a fee simple title to, and has, under a claim of ownership used, occupied and been in the continuous and exclusive possession of the said right of way and bridges, sought to be subjected to the use of the defendant, the Western Union Telegraph Company, by the condemnation proceedings, hereinafter mentioned.

III.

The Defendant, the Western Union Telegraph Company, owns, maintains and operates, and for many years has owned, maintained and operated a line of telegraph poles and wires upon and along the said right of way, from the dividing line between the State of Alabama and the State of Mississippi, to the dividing line between the State of Mississippi, and the State of Louisiana. Said telegraph line is, and for many years has been located,

maintained and operated upon Complainant's said right of way, and upon or attached to its said bridges, under a contract between the complainant and the defendant, the Western Union Telegraph Company, and not otherwise, and by one of its provisions said contract may be terminated by either of the parties thereto at the expiration of one year, after written notice shall have been given by one of the parties thereto, to the other of said parties, of a desire or intention to terminate same. Said contract will terminate on August 17th, 1912, pursuant to a notice that has been given thereof, as provided by the terms of said contract.

67

IV.

Under alleged power of eminent domain, which it claims is vested in it by the laws of the State of Mississippi, the defendant, the Western Union Telegraph Company, attempted to obtain by proceedings herein alleged and complained of, the right to continue the use of Complainant's said right of way for the maintenance and operation of said Western Union Telegraph Companies said existing line of poles and wires thereon, without any intention to construct any new telegraph lines, and to this end the said defendant, the Western Union Telegraph Company, presented three separate applications for the condemnation to the use of the defendant, the Western Union Telegraph Company, of parts of Complainant's said right of way, and bridges lying in said respective counties, as hereinafter alleged.

V.

A copy of each said applications are hereto attached and made parts hereof, and are marked Exhibit "A", "B", and "C" respectively.

VI.

Section 1854, Chapter 43 of the Code of Mississippi of 1906 provides as follows:

"Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this Chapter, and not otherwise except as specified in Chapter on landings, mill and mill dams, and roads, ferries and bridges."

Section 1856, which, likewise part of Chapter 43 of the Code of Mississippi of 1906, provides as follows:

"When any person or corporation having the right to do so shall desire to exercise the right of eminent domain, he or it shall make application therefor, in writing, and the owners of the property sought to be condemned, and the mortgages, trustees or other persons having any interest therein, or a lien thereon, shall be made defendants thereto, which shall state, with certainty, the right, and describe the property sought to be condemned, showing that of each defendant separately. Applications shall be presented to the Clerk of the Circuit Court of the County who shall indorse thereon his appointment of a competent Justice of the Peace of the County in which the property, or some part of it, is situated, to constitute, with a jury, a special Court of eminent domain; and he shall fix the time and place in the County for the organization thereof."

68 The application of which Exhibit "A" is a copy, was presented to A. J. Ramsay, Jr., the Deputy Clerk of the Circuit Court of Harrison County, Mississippi, and thereupon said Deputy Clerk made a separate order in writing, appointing one, H. D. Moore, a Justice of the Peace, of Harrison County, Miss., to try, with a jury to be drawn, the issue between the Complainant and the Defendant, and fix the 27th day of December, 1911, at 10 o'clock, A. M., in the Court House of Harrison County, Miss., for the organization of a Court of eminent domain, but made no indorsement of such appointment upon the application presented to him by the complainant.

The application of which Exhibit "B" is a copy was presented to one, W. C. Havens, the Deputy Clerk of the Circuit Court of Jackson County, Mississippi, and upon presentation of such application, to the said Havens, he,

the said Havens, made an order, in writing, appointing one, Chas. E. Chidsey, a Justice of the Peace, of Jackson County, Miss., to try, with a jury which was summoned, the issue between the Complainant and the Defendant, and fix the 10th day of January, 1912, in the Court house of Jackson County, Mississippi, for the organization of a special Court of eminent domain, but said appointment was not endorsed upon the application.

Thereafter, on the 29th day of December, 1911, Fred Taylor, who was Clerk of the Circuit Court of Jackson County, made an endorsement upon said application, and re-issued and caused a new summons to be served upon the Complainant, the said endorsement reading as follows:

“Western Union Telegraph Company,

vs.

Louisville & Nashville R. R. Co., et als.

I, Fred Taylor, Clerk of the Circuit Court of Jackson County, do hereby certify that the petition upon which this endorsement is made, was filed in my office on the 25th day of November, A. D., 1911, and immediately upon the filing of said petition, I appointed and constituted Chas. E. Chidsey, a duly qualified Justice of the Peace of said county, to try, with a jury drawn according to law, the issue between the Western Union
69 Telegraph Company, and the Defendant, the Louisville & Nashville R. R. Co., et als., which appointment was made in writing and duly filed with the papers in the cause, and I fixed 10 o'clock A. M., of the 10th day of January, A. D., 1912, at the court house of said County at Pascagoula, Miss., as the time and place for the hearing of said cause, all of which was done in writing and duly fixed in the records of this cause.

Now, therefore, in pursuant of said Act, and in order to further evidence the same, I now on this the 29th day of December, make this indorsement upon said petition, and also attach and fix to said petition the required appointment and designation made by me at the time said petition was filed.

Given under my hand, this the 29th day of December,
A. D. 1911.

FRED TAYLOR,
Clerk Circuit Court, Jackson Co."

Upon the hearing of the application by the alleged Court of eminent domain, on the 10th day of January, 1912, the defendant, the Western Union Telegraph Company, amended its said application, and a copy of said Amendment is hereto attached, marked Exhibit "B" and made a part hereof.

The application of which Exhibit "C" is a copy was presented by the Complainant to W. W. Stockstill, the Clerk of the Circuit Court of Hancock County, Mississippi, and he, the said W. W. Stockstill, made and order, in writing, appointing Jno. A. Breath, a Justice of the Peace of the said County, to try, with a jury to be drawn, the issue between the Complainant and the Defendant, and fix the 8th day of January, 1912, in the court house of Hancock County, Mississippi, for the organization of a special Court of eminent domain, but said appointment was not indorsed upon the application.

Thereafter, on the 30th day of December, 1911, the said W. W. Stockstill, the Clerk of the Circuit Court of Hancock County, made an indorsement upon the said application and re-issued and caused a new summons to be served upon the Complainant, the said indorsement reading as follows:

"The Western Union Tel. Co.,

vs.

Louisville & Nashville R. R. Co., et als.

I, W. W. Stockstill, Clerk of the Circuit Court of Hancock County, do hereby certify that the petition upon which this indorsement is made, was filed in
70 my office on the 28th day of November, A. D., 1911, and immediately upon the filing of said petition I appointed and constituted Mr. Jno. Breath, a duly qualified Justice of the Peace of said County, to try with a jury drawn according to law, the issue between the Western Union Tel. Co., and the defendants

the Louisville & Nashville R. R. Co., et als., which appointment was made in writing and duly filed with the papers in this case, and I fixed 10 o'clock A. M. of the 8th day of January, A. D. 1911, at the court house of said County in Bay St. Louis, as the day and place for the hearing of said cause, all of which was done in writing and duly filed in the records of this case.

Given under my hand this the 30th day of December, A. D. 1911.

(Signed) W. W. STOCKSTILL,
[Seal] Clerk Circuit Court, Hancock County."

VII.

On the 27th day of December, 1911, the said H. D. Moore, and the jury drawn for the purpose, organized what purported to be a Court of eminent domain.

Before the said Justice of the Peace and jury, purported to act as a Court of eminent domain, entered upon the hearing of the testimony, the defendant in said proceeding, the Louisville & Nashville R. R. Co., protested against the proceeding with the hearing of the application of the Western Union Telegraph Company, to condemn any portion of the right of way and bridges of the Complainant on the ground that no competent Justice of the Peace had been appointed by endorsing such appointment on the application for condemnation, as required by law, and the said H. D. Moore was without authority to proceed with said condemnation proceeding. Disregarding said protest, the said alleged Court of eminent domain, proceeded to hear evidence as to the value of the property to be taken, and after said evidence had been heard, the said jury returned a verdict in the following language:

"We, the jury, find that the defendants, the New Orleans, Mobile & Texas R. R. Co., as re-organized, the Louisville & Nashville R. R. Co., and the Farmers Loan & Trust Company, will be damaged by the taking of their property for public use, in the sum of \$150.00"

Said verdict was signed by all of the jurors.

Upon the return of said verdict, the said alleged Court of eminent domain, entered the following judgment:

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"In this case the claim of the Western Union Telegraph Company, who have condemned certain lands and property named in the application, to-wit: So much of the right of way of the main line of the Louisville & Nashville R. R. Co., as lies in Harrison County, Mississippi, running from a point on said right of way on the line dividing the Counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the Defendant Railroad Company, spanning the said Bay of Biloxi; on the east, and thence extending westwardly through the county of Harrison to the dividing line between said county and Hancock County, on the west which is a point in the middle of the Bay of St. Louis, and on the bridge of the defendant Railroad Company, spanning said Bay of St. Louis, being a distance of thirty miles more or less, and which route is shown and delineated on a map or blue print annexed to applicants petition as Exhibit "A". Said right of way being 100 feet wide and constituting with those portions of the bridges lying in Harrison County, a continuous strip of land extending from Jackson County line on the west, and being right of way over which the main line of defendant between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross-arms and wires to such portions of said bridges above mentioned as lie within said Harrison County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and will in no wise hamper, impede, obstruct or interfere with the use thereof by said defendants and others authorized to use.

"This condemnation for the purpose of permitting said Western Union Telegraph Co., to erect one line of poles with the cross-arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all the safeguards set forth in petitioner's petition, that is to say, in such manner and at such distance from defendants track as in no way to interfere

with the operation of trains of said defendants or with any proper legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all of the stipulations and agreements in said petition contained, being the property of the L. & N. R. R. Co., and the New Orleans, Mobile & Texas R. R. Co., as re-organized, and in which the Farmers Loan & Trust Co., is interested as the Trustee in certain mortgages as submitted to a jury composed of: A. V. Marshal, N. J. Gillen, Jno. Wein, Armond Sellier, J. B. Ladnier, Tom Cousins, J. J. Bond, W. W. Harrison, Joseph Saucier, L. A. Witter, F. S. Bond, and A. F. Breland, and on the 28th day of December, A. D. 1911, and the jury returned a verdict fixing the defendants due compensation and damages at \$150.00, and the verdict was received and entered. Now upon payment of said award, applicant can enter upon and take possession of said property and appropriate it to public use as prayed for in the application.

72 Let the applicant pay the costs for which let execution issue. December 28th, 1911 H. D. Moore, Justice of the Peace."

The Western Union Telegraph Company tendered to the Complainant the amount of damages so adjudged with interest, but the same was not accepted by the Complainant.

On the 8th day of January, 1912, the said Jno. A. Breath, Justice of the Peace as aforesaid, together with a jury drawn, met at the court house of Hancock County, and organized what purported to be a Special Court of eminent domain.

Before said alleged Court of eminent domain proceeded to take testimony, the defendant protested against the proceeding with the hearing of the application of the defendant to condemn any portion of the right of way and bridges of the complainant, upon the ground that no competent Justice of the Peace had been appointed by an indorsement upon complainant's application for condemnation, and that the said John A. Breath was therefore without jurisdiction or authority to proceed in the

matter. The said alleged Court of eminent domain disregarded said protest and proceeded to hear the evidence as to the value of the property to be taken, and after said evidence had been heard, the jury rendered a verdict in the following language:

"We, the jury, find that the defendants the New Orleans Mobile & Texas R. R. Co., as re-organized, the Louisville & Nashville R. R. Co., and the Farmers Loan & Trust Co., will be damaged by the taking of their property for public use in the sum of \$650.00"

Said verdict was signed by all of the jurors.

Upon the return of said verdict, the said Court of eminent domain entered the following judgment:

"In this case the claim of the Western Union Telegraph Company to have condemned certain lands and property named in the appluvation, to-wit: So much of the right of way of the main line of the Louisville & Nashville R. R. Co., as lies in Hancock County, Miss., running from a point on said right of way on the dividing line between the counties of Hancock and Harrison, on the bridges crossing the Bay of St. Louis, and on the east and thence extending through the County of Hancock to the head of the stream of East Pearl River, which is the Western boundary of the State of Miss., separating same from the State of Louisiana; being a distance of seventeen (17) more or less, and which said route is shown or delineated on a map or blue print annexed to petitioner's
73 petition, marked Exhibit "A". The said right of way being about (100) one hundred feet wide, and constituting together with that portion of the bridge over the Bay of St. Louis lying in Hancock County, and that portion of the East Pearl river bridge lying in the State of Missississippi, one continuous and contiguous strip and body of land, and track extending from Harrison County line on the east, to the Louisiana line on the west, and being the right of way over which the main line of said defendants between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross-arms and wires to such portions

of the bridges over Bay St. Louis and East Pearl river above mentioned as lie within said Hancock County, in such convenient and proper way, and by such prudent and proper means, as will in no wise endanger or impair said bridges, and will in no wise hamper, impede, obstruct or interfere with the use thereof by the defendants, and all others authorized to use same. This condemnation being for the purpose of permitting said Western Union Telegraph Company to erect one line of poles with cross-arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all of the safeguards set forth in petitioner's petition, that is to say, in such manner and at such distance from defendant's track as in no way to interfere with the operation of trains of said defendant, or with any proper or legitimate use thereof by defendant, or the use by any telegraph or telephone now existing thereon, and so as not to be dangerous to persons and property and subject to all the stipulation and agreements in said petition contained, being the property of the L. & N. R. R. Co., and the N. O. M. & T. R. R. Co., as re-organized, and in which the Farmers Loan & Trust Co., is interested as a Trustee in certain mortgages, was submitted to a jury composed of J. P. Adams, Elmer Bourgeois, A. A. Hart, C. L. Joyner, Alfred Keonan, Salvator Nicaise, Alfred Besancon, Thomas J. Conway, H. Uhvairin, Emile Pene, Louis Tricon, and H. W. Driver, on the 8th and 9th days of January, A. D. 1912, and the jury rendered a verdict fixing the defendants due compensation and damages at six hundred and fifty dollars (\$650.00), and the verdict was received and entered. Now upon payment of said award, applicant can enter upon and take possession of said property and appropriate it for public use as prayed for in the application.

Let the applicant pay the cost for which let execution issue.

Jan. 9th, 1912,

(Signed)

J. A. BREATH, J. P."

The defendant, the Western Union Telegraph Company, thereafter tendered to the Complainant the amount of damages so adjudged, with interest, but the same was not accepted by the Complainant.

On the 10th day of January, 1912, the said Chas. E. Chidsey, Justice of the Peace aforesaid, together with the jury drawn, met at the Court house of Jackson County, and organized what purported to be a special Court of eminent domain.

Before the said alleged Court of eminent domain proceeded to take testimony, the defendant protested against proceeding with the hearing of the said application of the defendant to condemn any portion of the said right of way of the complainant, upon the ground that no competent Justice of the Peace had been appointed by an indorsement upon complainant's application for condemnation and that the said Chas. E. Chidsey was therefore without jurisdiction or authority to proceed in matter. The said alleged Court of eminent domain disregarded said protest, and proceeded to hear the evidence as to the value of the property to be taken, and after said evidence had been heard, the jury rendered a verdict in the following language:

"We, the jury, find that the defendants the New Orleans, Mobile & Texas R. R. Co., as re-organized, the Louisville & Nashville R. R. Co., and the Farmers Loan & Trust Co., will be damaged by the taking of their property for public use, in the sum of \$150.00."

Said verdict was signed by all of the jurors.

Upon the return of said verdict, the said Court of eminent domain entered the following judgment:

State of Mississippi,
Jackson County.

Special Court
of
Eminent Domain

Western Union Telegraph Company
vs.
Louisville & Nashville R. R. Co., et als.

In this case the claim of the Western Union Telegraph Company, to have condemned certain lands and property named in the application, to-wit: So much of the right

of way of the main line of the Louisville & Nashville R. R. Co., as lies in Jackson County, Miss., running from a point on the right of way of said Railroad Company on the dividing line between the States of Alabama and Mississippi, near Pecan station, on the east, and thence extending through the County of Jackson to the dividing line separating the Counties of Jackson and Harrison in the State of Mississippi, being a distance of twenty-two (22) miles, more or less, and which said route is shown and delineated on a map or blue print filed with petitioner's petition, marked Exhibit "A", except so much thereof as consists of bridges in said Jackson County,

75 said right of way being (100) one hundred feet wide, and constituting the right of way of said Railroad Company lying in Jackson County, Miss., and extending from the Alabama line on the east to the Harrison County line on the west, being the right of way over which the main line of said Railroad between New Orleans and Mobile is now constructed and being operated, excepting so much thereof as consists of bridges in said Jackson County.

This condemnation being for the purpose of permitting said Western Union Telegraph Company to erect one line of poles with cross-arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all of the safeguards set forth in petitioner's petition, "that is to say in such manner and at such distance from defendants track as in no way to interfere with the operation of trains of said defendant or with any proper or legitimate use thereof by defendant, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all stipulations and agreements in said petition contained being the property of the Louisville & Nashville R. R. Co., and in which the Farmers Loan & Trust Company is interested as Trustee in certain mortgages ~~and~~ submitted to a jury composed of:

(Here followed the names of the jury).

On the 10th and 11th days of January, A. D. 1912, and the jury returned a verdict fixing the defendants due compensation and damages at one hundred and fifty dollars (\$150.00) and the verdict was received and en-

tered. Now, upon payment of said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs for which let execution."
January 11th, 1912.

(Signed)

C. E. CHIDSEY, J. P.

76 Chapter 43 of the Code of Mississippi provides as hereinabove shown for the creation of a special statutory Court of eminent domain, but said Court, under said provision can be created and given jurisdiction only by proceeding in strict conformity with the provisions of said chapter. By the provisions of said chapter, hereinabove set out, authority is conferred upon the Clerks of several Courts to appoint a competent Justice of the Peace to serve as part of the Special Court of eminent domain and to cause a jury to be drawn and summoned, but does not confer such powers upon the deputies of such clerks or upon any other persons.

Said Chapter 43 authorizes and empowers the said Clerks of the Circuit Courts to appoint a competent Justice of the Peace by indorsing the same upon the application of condemnation so presented to them, but does not authorize such Clerks to appoint such Justices of the Peace by a separate order not indorsed upon such application.

Complainant shows to the Court that the whole proceedings for the condemnation of its right of way attempted to be had in Harrison, Jackson and Hancock Counties, are void, because the several Justices of the Peace who presided over, and acted as parts of said alleged Courts of eminent domain, were not appointed by indorsements made upon the applications presented by the Western Union Telegraph Company.

Complainant shows to the Court that in addition to this the proceedings under which condemnation of its right of way in Jackson and Hancock Counties were attempted, were void for the further reason:

1. Because the applications by which the said proceedings purported to have been condemned, were not presented to the several Clerks of said Counties.

2. Because the Clerks of said Counties made no appointment of a competent Justice of the Peace to act in said proceedings.

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IX.

Complainant further shows to the Court that Chapter 43 of said Code of Mississippi, which is the Chapter referred to in Section 929 of the Code of Mississippi, giving a right of condemnation to the Telegraph and Telephone Companies, prescribes the method in which eminent domain shall be exercised by persons and corporations having the power of eminent domain, but neither said chapter, nor Section 929, nor any other law of the State of Mississippi, extended the right to exercise said power of eminent domain to property already devoted to public use, and said complainant's right of way was, at the time that said condemnation proceedings were instituted still is, and for many years prior thereto, has been devoted to public use, namely, to the use of complainant for the purpose of a common carrier railroad and right of way therefor.

Long prior to the commencement of the proceedings for the condemnation complained of in the bill of complaint, complainant was by its charter, and amendments thereto, authorized and empowered, in accordance with the laws of the State of Kentucky, to operate and maintain telephone and telegraph lines on, over and along its rights of way and elsewhere, in the several States of the United States, including the State of Mississippi, not only for the conduct of its own railroad business, but for commercial purposes, and as common carrier of messages, news, intelligence and information for the public, and the receipt and delivery thereof, for just and reasonable compensation or hire, as provided for by the laws of said several States.

Under the said powers so conferred upon it, complainant is a telegraph company within the meaning of an Act of Congress entitled, "An Act to aid the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," approved July 24, 1866, and the amendment thereto,

and the complainant, long prior to the commencement of the condemnation proceedings complained of, duly filed with the Postmaster General of the United States its acceptance in writing of the restrictions and obligations required by law, all as provided for in the said Act of Congress.

By virtue of the powers conferred upon it by its charter, as well as by said Act of Congress, complainant was, prior to the institution of said condemnation proceedings, duly authorized and empowered to construct, maintain and operate lines of telegraph over and through any portions of the public domains of the United States and with your consent, along any of the military and post roads of the United States, (including its own) which have been and may hereafter be declared such by Act of Congress, and over, under and across the navigable streams or waters of the United States, provided such lines of telegraph shall be so constructed and maintained as not to obstruct or interfere with the ordinary travel on such post roads.

Complainant further shows that its said right of way prior to the institution of the said condemnation proceedings was, and still is devoted to the use by complainant for the purpose of constructing and maintaining thereon, should the necessity arise a telegraph line, as well as for the purpose of a right of way for its said railroad, and that both of said uses were and are, public uses.

Complainant further shows that on and after the 17th day of August, 1912, its said contract with the defendant for the use of the defendant's telegraph wires and the operation upon said complainant's railroad, expired, and it will be necessary for the complainant to erect, maintain and operate upon its said rights of way in the State of Mississippi, and elsewhere, a telegraph line in aid of the operation of its railroad, and it contemplates operating said line over its said right of way, and over other property where its rights of way do not extend, not only in aid of the operation of its railroad but for commercial uses by the public, and the maintenance by the defendant of a telegraph line over complainant's said right of way in the State of Mississippi will greatly interfere with the

79 use of said rights of way by complainant in the operation of the said railroad and telegraph lines, and will unreasonably hinder and interfere therewith and thereby take complainant's property already devoted by it to public uses, and devote the same to a different public use, and will further operate to deprive Complainant [Complainant] of its said property without due process of law, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, and will further interfere and trammel the interstate commerce with which the complainant will be engaged in the operation of its said railroad and telegraph lines, in contravention of sub-division 3, Section 8, Article 1, of the Constitution of the United States, and complainant here invoked and relies upon the protection of the said provisions of the Constitution of the United States against the enforcement of the several judgments of condemnation complained in bill of complaint; and against the taking or use of its said rights or way by the defendant as it has proposed to take and use the same.

X.

Complainant further shows to the Court that said Western Union Telegraph Co., had no power or authority to condemn to its use, any portion of Complainant's right of way and bridges, in that;

(a) The only right which it had, or claimed to have, to condemn the said right of way and bridges of complainant was conferred upon it by Sections 925 and 929 of the Code of Mississippi of 1906, and by the provisions of Chapter 43 of said Code of Mississippi, prescribing the method in which the right of eminent domain should be exercised.

The said Section 925 of the Code of Mississippi authorizes all companies or Associations of persons incorporated or organized for the purpose of constructing telegraph and telephone lines, to construct the same, and to set up and erect their posts and fixtures along and across any of the public highways, streets and waters, and along and across all turnpikes and railroads, but it does not authorize such telegraph and telephone companies to

80 condemn the rights of way of railroads, or to set up and erect their posts and fixtures across or along said rights of way without the consent [consent] of the said railroad companies, and complainant did not consent to the use of its right of way or bridges, or any part thereof, for the construction of said telegraph lines of the defendant, the Western Union Telegraph Company.

(b) Said Section 929 of the Code of Mississippi, of 1906 gave to telegraph and telephone companies the power to exercise the right of eminent domain as provided in the Chapter of the Code of Mississippi in that subject, for the purpose of constructing new lines, but it did not give to such telegraph and telephone companies any right of eminent domain for the continuance and maintenance of any existing telegraph line, so much of said section as relates to said matter, reads as follows:

"Telegraph and telephone companies for the purpose of constructing new lines are empowered to exercise the right of eminent domain as provided in the Chapter on that subject."

Complainant further shows to the Court that neither under Sections 925 and 929, nor under any other law of the State of Mississippi, was there vested in the defendant, the Western Union Telegraph Company, any right or power to condemn to its use, any portion of the said right of way or bridges of the complainant, the Louisville & Nashville R. R. Co., for the purpose of maintaining an existing telegraph line.

Complainant further shows to your Honor that although it is alleged in the several petitions of the Western Union Telegraph Company that the telegraph line for which it desired to condemn a right of way was to be a new line, in fact, and in truth, the said Western Union Telegraph Company, did not desire the said right of way for the purpose of erecting any new telegraph line, nor did it intend to use the same for that purpose. It desired and intended to obtain said right of way for the purpose of maintaining its said existing telegraph line thereon. This was shown by the testimony introduced by the
81 defendant, the Western Union Telegraph Company, in each of said condemnation proceed-

ings, and the said Western Union Telegraph Company had no right to condemn the property of the defendant for said purpose.

XI.

The Complainant states that it is, and has been for a great number of years, a common carrier by railroad engaged in interstate commerce as well as intrastate commerce, in the State of Mississippi, and among that and other States of the United States, subject to the Act of Congress to regulate commerce approved Feb. 4th, 1887, and the Amendment thereto, and its system of railroads located in Mississippi and outside of that State are military and post roads within the true intent and meaning of the Act of Congress approved June 15th, 1866, (52-58 U. S. Com. Stat. 1901) and the Act of Congress approved June 8th, 1872, (Section 39 54, U. S. Com. Stat. 1901) which authorized and empowered every railroad operated by steam as the complainant's said railroad were then, have been ever since, and are now, to carry freights, passengers, government supplies, troops, mails and property on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of same to the place of destination, and which Acts were enacted under the powers vested in Congress to establish post roads to regulate commerce among the several states which had previously existed and to prevent such trammels in the future, and were intended among other objects and purposes to reach trammels interposed by State enactments.

The Congress of the United States passed an Act, dated July 24th, 1866, which reads as follows:

An Act to aid the Construction of Telegraph Lines and to Secure to the Government of the Use of the Same for Postal, Military and Other Purposes;

82 "Be it enacted, by the Senate and House of Representatives of the United States of America in Congress Assembled, that any Telegraph Company

now organized, or which may hereafter be organized, under the laws of any State in this Union shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, and along any of the military or post roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States; Provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with ordinary travel on such military or post roads (railroads) and any of such companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance, and operation of said lines or telegraph, and may pre-empt and use such portions of the public lands subject to the pre-emption through its said lines of telegraph may be located as may be necessary for its station, not exceeding forty acres for each station; but such station shall not be within fifteen miles of each other.

Section 2. And be it further enacted, that telegraph communications between the several departments of the Government of the United States and their officers and agents shall in their transmission over the lines of any said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.

Section 3. And be it further enacted, that the rights and privileges hereby granted shall not be transferred by any company acting under this Act to any other corporation, association, or person; provided, however, that the United States may at any time after the expiration of five years from the date of the passage of this Act, for postal, military or other purposes, purchase all of the telegraph line, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster

General of the United States, two by the Company interested, and one by the four so previously selected.

Section 4. And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their writter exceptions with the Postmaster General, of the restrictions and obligations required by this Act."

By said Act, Congress dealt with the subject of the use of the rights of way of military and post roads by telegraph companies, and prescribed the terms and conditions upon which said rights of way should be used by telegraph companies, and it hereby took exclusive control of said subject and excluded the right of the legislatures of the several States, including the legislature of the State of Mississippi from the right to legislate with regard thereto, and Section 929 of the Code of Mississippi, which attempts to confer upon telegraph companies the right to condemn the rights of way of railroads in the said State of Mississippi, is, in so far as it purports to confer upon telegraph companies the right to condemn parts of the rights of way of military and post roads in said State, and especially in so far as it purports to authorize such condemnation of parts of the right of way of Complainant's railroad, said Section operates as illegal interference with the exclusive right of Congress to regulate interstate commerce and the instruments thereof, and in conflict with and contravention of sub-section 3, Section 8, Article 1, of the Constitution of the United States, granting to Congress complete and exclusive power to regulate commerce among the several States, and said Section 929 of the Code of Mississippi operates to impose a burden upon such commerce and upon the instruments thereof, in contravention of the said Section of the Constitution of the United States, and the said several judgments of condemnation hereinbefore alleged and complained of and the enforcement thereof, and the use that may be

84 made of complainants right of way under or by virtue of said judgments, will operate as an illegal interference with exclusive power of Congress to regulate such commerce among the several states of the

United States and will operate to impose a burden upon said commerce and the instruments thereof as aforesaid. Complainant herein votes and relies upon the protection of said provisions of the constitution of the United States against the taking or use of any part of its said right of way for the use of the defendants, the Western Union Telegraph Company.

XII.

By the seventeenth section of the Constitution of Mississippi, it was and is provided as follows:

‘Private property shall not be taken or condemned for public use except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law, and wherever an attempt is made to take private property for a use alleged to be public, whether the contemplated use be public shall be a judicial question, and as determined without regard to legislative assertion that the use is public.’

As heretofore alleged, the only right vested in the complainant, the Western Union Telegraph Company, by the laws of Mississippi to condemn property to its use, as it has attempted to condemn the right of way of this complainant, was conferred upon it by section nine twenty-nine of the Code of Mississippi, and by said section it is only authorized to condemn such property “for the purpose of constructing new lines,” and a new line is constructed within the meaning of said statute—as declared by the Supreme Court of Mississippi, whenever the Telegraph Company changes its route and runs its lines in a different route from that already occupied by it,

85 involving the necessity of taking and occupying lands heretofore occupied by it.

By Section 925 of the Code of Mississippi, Telegraph Companies are authorized to construct their lines along and across public highways, streets and waters, and along and across turn pikes, railroads, canals and other public lands but is expressly provided that “the same shall be so constructed and placed as not to be dangerous to per-

sons, or property or interfere with the common use of roads, streets or waters, or with the convenience of any land owner, more than may be unavoidable."

Under the provisions of Chapter 43 of the Code of Mississippi, the several Clerks of said Circuit Courts to whom the law requires the applications for condemnation of lands to be presented, had no power or authority to hear or determine, upon the presentation of said applications to them, nor did said Deputy Clerks have any power or authority to hear or determine, upon the presentation of such applications to them:

1. Whether the use for which the Western Union Telegraph Company sought to condemn the property of the Complainant was a public use, or,

2 Whether the property of Complainant sought to be condemned by the Western Union Telegraph Company, was already devoted to a public use, and whether if so devoted, it was subject to condemnation by the said Western Union Telegraph Company, for the purpose set out in its several applications, or,

3. Whether the Western Union Telegraph Company sought by several applications, to condemn the property of Complainant for the use of a new line, or only for the maintenance of an existing line, or,

4. Whether the construction of the said telegraph line, as proposed under said application for condemnation, would be so placed as not to be dangerous to persons or property, with the common use of complainant's right of way more than might be unavoidable, or,

5. As to what interest complainant had in the property sought by said Western Union Telegraph Company to be condemned.

So much of said Chapter 43 as relates to this matter is contained in section 1856 of the Code of Mississippi, and reads as follows:

"When any person or corporation having the right to do so shall desire to exercise the right of eminent domain, he or it shall make application therefor, in writing, and the owners of the property sought to be condemned and mortgagees, trustees or other persons having any interest therein, or lien thereon shall be made defendants thereto, which shall state with certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the Clerk of the Circuit Court, who shall indorse thereupon his appointment of a competent Justice of the Peace of the County in which the property, or some part thereof, is situated, to constitute, with a jury a special Court of eminent domain; and he shall fix the time and place in the County for the organization thereof."

Under Section 1858, of the Code of Mississippi, which is a part of said chapter, Number 43, the said Sheriffs of the several counties were required to execute the sermons and venire facias, provided for by the indorsements of Clerks as aforesaid, and made due returns thereof to the Justice of the Peace, at times and places fixed; and under section 1862 of the Code of Mississippi, which is also a part of said chapter 43, the said Justices of the Peace were required to organize said juries, and were expressly denied the right to organize said juries, and were expressly

87 denied the right to quash the proceedings or
dismiss the Court of eminent domain for any
cause, and said Section expressly prohibits an
appeal from said proceedings until after a verdict is rendered by the jury. So much of said Section as denies to the said Justice of the Peace the right to quash the said proceedings, and prohibits an appeal until after the verdict is rendered reads as follows:

"The Justice of the Peace shall not for any cause quash the proceedings or dismiss the Court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning or impaneling shall vitiate the verdict or judgment and no appeal certiorari shall be allowed until after the verdict by the jury."

By Section 1865 of the Code of Mississippi, which is also a part of said Chapter 43, the form of charge to be given the jury by the Justice of the Peace, is prescribed, and said form of charge expressly submits to the jury only the determination of the amount of damage which the defendant in the condemnation proceedings will sustain by the taking of his or their property. The provisions of Section 1865 relating thereto, are as follows:

"The Justice shall instruct the jury, in writing, in the following words: The defendant is entitled to recover damages in this case, and it develops on you honestly and impartially to estimate the sum thereof, according to the verdict adduced on the trial, the weight and credibility of which you are the sole judge. The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made."

88 Under Section 1865, which is also a part of Chapter 43, the form of the verdict to be returned is prescribed, said Section reads as follows:

"We, the jury, find that the defendant (naming him) will be damaged, by the taking of his property for public use, in the sum of dollars."

Under Section 1867, which is also part of Chapter 43, the form of judgment to be rendered is prescribed, and the language of said Section, in regard thereto, is as follows:

"Upon the return of a verdict, the Court shall enter a verdict as follows, viz: 'In this case, the claim (naming him) (or them) to have condemned certain lands named in the application, to-wit: (here describe the property), being the property of (here name the owner) was submitted to a jury composed of (here insert their names)

on the day of A. D., and the jury returned the verdict fixing the said defendants due compensation and damages at dollars and the verdict was received and entered. Now, upon the payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs for which let execution issue.' J. P."

Section 1871 of said Code, which is also a part of said Chapter 43 authorizes an appeal to the Circuit Court, from the finding of the jury of the special eminent domain Court, by executing a bond, with sufficient security, payable to his adversary, in a penalty of \$300.00, conditioned to pay all costs that may be adjudged against it, which bond was required to be given within twenty days after the rendition of the verdict,—but said section expressly provides that if the appeal by the defendant,
 89 ant, it shall not operate as a supersedeas, nor shall the right of the complainant to enter in and upon the land of the defendant, and to appropriate the same to public use, be delayed. So much of said section as relates to this matter reads as follows:

"Every party shall have the right to appeal to the Circuit Court from the finding of the jury in the special court by executing a bond with sufficient security, payable to his adversary, in a penalty of \$300.00, conditioned to pay all costs that may be adjudged against him, which bond shall be given within twenty days after the rendition of the verdict and may be approved by the Justice. If the appeal be by the defendant, it shall not operate as a supersedeas, nor shall the right of the applicant to enter in and upon the land of the defendant and to appropriate the same to public use be delayed. Upon appeals, the issue shall be tried de novo in the Circuit Court, which shall try and dispose of it as other issues and enter all proper judgments."

XIII.

Complainant shows to the Court, that although the defendants, the Western Union Telegraph Company, as

hereinabove alleged and shown, had and has now, no right to condemn any part of complainant's right of way to its use, and although no eminent domain court was lawfully organized and given jurisdiction to act upon said several applications made by defendant, the Western Union Telegraph Company, to condemn the several parts of defendant's right of way and bridges, or any part thereof, the defendant has, under Chapter 43 of the Code of Mississippi, obtained what purport to be judgment of Courts of eminent domain, condemning to its use portions of the right of way and bridges of complainant, and said judgment, if valid, would authorize the defendant, and due in fact purport to authorize it to enter upon and take possession of and use parts of the Com-

90 complainant's right of way in said Counties of Jackson, Harrison and Hancock, in the State of Mississippi, and defendant claims that under and by virtue of said judgments, it has the right to enter upon, take possession of, and use parts of Complainant's said right of way in said counties, and the defendants intend to and will, under said judgments and under color of right derive therefrom, take possession of parts of Complainant's right of way in said several counties described in said judgments, and use the same for the maintenance of its poles, wires, and other appliances and for maintaining and repairing the same unless enjoined from so doing by this Honorable Court, and the Complainant will be deprived of its property without the due process of the law, in that by said judgments its property has been condemned without its having had an opportunity to be heard as to whether the use for which said property is so proposed to be taken, is a public use, or as to whether the purpose for which said property purports to have been condemned is for the erection of a new line, or only for the maintenance of an existing line, or as to whether or not said line is proposed to be constructed so as not to be dangerous to persons and property, and so as not to interfere with the convenience of the Complainant more than is unavoidable; all in violation of the Fourteenth Amendment to the Constitution of the United States, and the Complainant here invokes and relies upon the protection of the provisions of the said Fourteenth Amend-

ment and claims the right under the provisions therein to have the defendant enjoined from taking possession and using Complainant's right of way under and by virtue of said judgments, and to have said judgments cancelled and annulled and decreed to be of no force and effect, and to have the cloud placed upon its property by said several judgments of condemnation removed.

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PRAYER.

To the end, therefore, the Complainant may have the relief which it can only obtain in a Court of Equity, and that defendant may answer the premises, but not under oath or affirmation, answer under oath being hereby expressly waived by Complainant.

Complainant now prays that the Western Union Telegraph Company, a corporation created by and organized under the laws of the State of New York, in the State of New York, but doing business by agent in the County of Jackson, in the State of Mississippi, be made party defendant to this bill of complaint, and that process may be issued to be served upon the said defendant in due form of law according to the rules and practices in this Honorable Court, requiring it to appear and plead to the several allegations of this bill of complaint within the time prescribed by law.

Complainant further prays that this Honorable Court will be pleased to grant an injunction restraining the said Western Union Telegraph Company, during the pending of this suit (1) from entering upon, or using,—otherwise that under the existing contract between the Complainant and the Defendant, any portion of Complainant's said right of way or bridges, hereinabove described, for the purpose of erecting, continuing and maintaining its telegraph poles, wires and other appliances, and from attaching its poles, wires or other parts of its line to Complainant's bridges, or any part of them, until this cause is finally heard and determined.

Complainant prays that at the hearing of this cause, this Honorable Court will be pleased to decree that the several judgments of condemnation for the use, by the Western Union Telegraph Company, of parts of the right

of way of the Complainant, for the erection by the said Western Union Telegraph Company of its poles, wires and appliances, and of the right to attach its poles, wires and other parts of its line, to Complainant's bridges, or any part of them, to be clouds upon the title of Complainant's right of way, for the several reasons assigned in the foregoing bill of complaint, and that this Honorable Court will be pleased to decree said several condemnation proceedings, and the said several judgments rendered therein, to be void and of no effect, and that it will permanently enjoin the said Western Union Telegraph Company, from entering upon, taking possession of or erecting any of its wires, or other appliances, upon Complainant's bridges or to any of them, after the termination by notice, or otherwise, of the contract under which it now occupies said right of way with its telegraph line.

Complainant further prays that this Honorable Court will grant unto it such other and further relief as it may be entitled to in the premises.

GREGORY L. SMITH,

Solicitors for Complainant.

State of Alabama,
County of Mobile.

Personally appeared before me, Gregory L. Smith, who being sworn, deposes and says that he is a District Attorney of the Louisville & Nashville Railroad Company, and as such, is authorized to make this affidavit upon its behalf, and that the statement contained in the foregoing bill of complaint is true.

GREGORY L. SMITH.

Subscribed and sworn to before me, this the 15th day of August, 1912.

Witness my hand and seal of my office.

KATHERINE WALSH.

(Seal.)

N. P., Mobile Co., Ala.

93 Exhibits "A," "B," "C" and "D,"—Petitions for Condemnation, omitted from the printed

record, being identical with Exhibits "A," "B," "C" and "D" heretofore copied at pages 30, 36, 41, and 46, respectively.

* * * * *

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INJUNCTION WRIT.

Filed, August 24th, 1912.

In the Chancery Court of the County of Jackson, State of Mississippi.

The Louisville & Nashville Railroad Company,
vs.
Western Union Telegraph Company.

To the Western Union Telegraph Company, and all Persons acting or purporting to act for it, or exercising or purporting to exercise for it, any rights under the several eminent domain proceedings heretofore instituted by the Western Union Telegraph Co., in the Counties of Jackson, Harrison and Hancock, for the condemnation for its use of portions of the rights of way of the Louisville & Nashville Railroad Company, under the judgments rendered therein:

Whereas, the Louisville & Nashville Railroad Company, a corporation created by and organized under the laws of the State of Kentucky, and having its principal place of business in the City of Louisville, in the State of Kentucky, has filed in the said Chancery Court of Jackson County, in the State of Mississippi, a bill of complaint against the Western Union Telegraph Company, a corporation created by and organized under the laws of the State of New York, and having its principal place of business in the City of New York, and has obtained thereon, an order or decree enjoining the said Western Union Telegraph Company, and all other persons acting or purporting to act for it, or exercising or purporting to exercise for it, any rights under the several eminent

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domain proceedings heretofore instituted by the Western Union Telegraph Company, in the Counties of Jackson, Harrison and Hancock, for the condemnation for its use of portions of the rights of way of the Louisville & Nashville R. R. Co., or under the judgments rendered therein in accordance with the prayer of the said bill of complaint, until said cause shall have been heard and determined.

Now, therefore, we, having regard in the matter in the said bill of complaint contained, do hereby command and strictly enjoin you, the Western Union Telegraph Company, and all persons acting or purporting for it, or exercising or purporting to exercise for it, any rights under the several domain proceedings heretofore instituted by the Western Union Telegraph Company, in the Counties of Jackson, Harrison and Hancock, for the condemnation of its use of portions of the rights of way of the Louisville & Nashville R. R. Co., under the judgments rendered therein, from entering upon or using said several rights of way, or any part thereof, for the construction or maintenance of any Western Union Telegraph Company's poles, wires or other appliances, or from in any other way exercising any rights under said proceedings and judgments therein.

Witness the seal of said Court, hereto attached, and the signature of its Clerk, this the 19th day of August, A. D. 1912, at 4:30 o'clock P. M.

FRED TAYLOR,

(Seal)

Clerk of the Chancery Court, Jackson County, Miss.

To the Sheriff of Jackson County to execute and return.

(The above indorsed on back as follows): Received in my office this the 19th day of August, 1912. Fred L. Lindinger, Sheriff.

I have this day executed the within writ by personally handing Jno. R. Watts, local agent at Pascagoula, Miss., of the within named Western Union Telegraph Company, a true copy of this writ.

This the 20th day of August, 1912.

FRED L. LINDINGER, Sheriff.

119 CHANCERY COURT SUMMONS.

Issued Sept. 30th, 1912. Filed, Sept. 30th, 1912.

The State of Mississippi,
Jackson County.

To the Sheriff of Jackson County, in said State:

You are hereby commanded to summon Western Union Telegraph Company, to appear before the Chancery Court of Jackson, in the State of Mississippi, at a term of said Court to be held on the third Monday in November, 1912, at the Courthouse in the City of Pascagoula, Miss., then and there to answer the bill of complaint of the Louisville and Nashville Railroad Company, wherein it is named as defendant, in our said Court; and further to do and receive what our Court shall have considered on its behalf, and this you shall in no wise omit; under the penalty of One Hundred Dollars, as well as the consequences that may fall thereon. And you have then and there this writ.

Given under my hand and seal of said Court, and issued this the 30th day of September A. D. 1912.

(Seal).

FRED TAYLOR, Clerk.

(The above indorsed on back, as follows): Received by me this the 30th day of September, A. D. 1912. Fred L. Lindinger, Sheriff of Jackson Co., Miss.

I have this day executed the within writ by personally handing J. R. Watts, local Agent at Pascagoula, Miss., of the within named Western Union Telegraph Company, a true copy of this summons.

This the 30th day of September, 1912.

FRED L. LINDINGER, Sheriff.

120 DECREE GRANTING INJUNCTION.

Filed, August, 1912, 4 o'clock P. M.

In the Chancery Court of the County of Jackson, State
of Mississippi.

Louisville & Nashville Railroad Company,

vs.

Western Union Telegraph Company.

The duly verified bill of complaint filed in the above entitled cause having been presented to me, together with a motion by complainant for an injunction pendentes lite as prayed for in said bill of complaint, and it appearing from the allegations of the bill of complaint that the said Western Union Telegraph Company has instituted proceedings in the counties of Jackson, Harrison and Hancock, respectively, for the purpose of condemning parts of the rights of way of the complainant, the Louisville & Nashville Railroad Company, in each of said counties to the use of the said Western Union Telegraph Company for the erection and maintenance of its poles, wires and other appliances thereon, which proceedings purport to conform to the provisions of Chapter forty-three of the Code of Mississippi of 1906, and that what purport to be judgments of condemnation have been rendered in each of said proceedings, and that in said proceedings no opportunity was offered to the Complainant to be heard as to whether or not the use of said property was sought to be condemned for the purpose of constructing and maintaining thereon a new line, or as to whether the use for which such condemnation was sought was a public use, or as to any other of the several defenses against said proceedings set up in the said bill of complaint, and that the complainant is entitled to be heard upon several questions before its property is taken by the Western Union Telegraph Company for the purposes for which such condemnation proceedings were instituted; Now, therefore, it is considered, ordered, adjudged and decreed that upon the complainant's filing with the Clerk of the Chancery Court of Jackson County its bond, with security, to be

approved by said Clerk, in the penal sum of
 121 twenty-five thousand \$(25,000.00) dollars, payable to the Western Union Telegraph Company, and conditioned to pay all damages and costs which may be awarded against complainant, or which the Western Union Telegraph Company may suffer or sustain by reason of the issuance of said injunction in case the same shall be dissolved, the Western Union Telegraph Company, and all persons acting, or purporting to act for it, or exercising, or purporting to exercising for it, any right under the said several proceedings and the judgments rendered therein, be and they are hereby restrained and strictly enjoined from entering upon or using said several rights of way or any part thereof under the condemnation proceedings complained of for the construction or maintenance of the Western Union Telegraph poles, wires or other appliances thereon, or from in any other way exercising any rights under said proceedings and judgments thereon, until said cause is finally heard and determined.

Made this the 17th day of August, A. D. 1912.

J. M. STEVENS,
 Chancellor.

122 NOTICE OF MOTION TO DISSOLVE IN-
 JUNCTION.

Filed Oct. 25th, 1912.

State of Mississippi, Jackson County, In the Chancery
 Court.

Louville & Nashville Railroad, .

vs.

Western Union Telegraph Company,

To the Louisville & Nashville Railroad Company, complain-
 ant in the above stated cause, or Mr. Gregory L.
 Smith, its Attorney of Record.

You will please take notice that we will, in the town of
 Hattiesburg, in the State of Mississippi, on November
 the 6th, 1912, at 10 o'clock A. M., before J. M. Stevens,

Chancellor, move the Court to dissolve the injunction heretofore granted in this cause against the defendant, copy of said motion being hereto attached.

HARRIS & POTTER,
For the Defendant.

Oct. 24th, 1912.

123 MOTION TO DISSOLVE THE INJUNCTION.

Filed Oct. 25th, 1912.

State of Mississippi, Jackson County, in the Chancery Court.

Louisville & Nashville Railroad Company
vs.
Western Union Telegraph Company.

Motion to Dissolve Injunction.

Comes the defendant, the Western Union Telegraph Company and moves the Court to dissolve the injunction heretofore granted in this cause against it, for want of equity on the face of the bill.

HARRIS & POTTER,
For Motion.

Oct. 24th, 1912.

In the Chancery Court of Jackson County, Mississippi.
In Vacation.

This cause was submitted upon the defendant's motion to dissolve the injunction heretofore granted for want of equity in the bill, and having been argued by counsel and considered by the Court, it is considered, adjudged and decreed by the Court that said motion be and the same is hereby overruled.

And the Defendants having applied for an appeal from this decree to the Supreme Court of Mississippi, and it appearing to the Court that such an appeal is proper in order to settle the principles of the cause, it is further considered ordered and decreed that such an appeal be allowed upon defendant giving bond as required by law within ten days hereof.

Ordered, adjudged and decreed by the Chancellor on this the 6th day of November, A. D. 1912.

J. M. STEVENS,
Chancellor.

MOTION OF CLAIM FOR DAMAGES.

Filed Nov. 14th. 1912.

In the Chancery Court of Jackson County, Mississippi.
 Louisville and Nashville Railroad Company,

vs.

Western Union Telegraph Company.

To the Complainant in the above stated cause, or its
 attorney of record, Mr. Gregory L. Smith:

You will take notice that on the hearing of the motion
 to dissolve the injunction herein the defendant will ask
 a decree on the dissolution of the said injunction for dam-
 ages as follows; to-wit;

Attorney's fee ~~\$75.00~~ \$750.00

HARRIS & POTTER,
 Attorneys for the Defendant.

126

APPEAL BOND.

In the Chancery Court.

State of Mississippi,
 County of Jackson.

Louisville & Nashville Railroad Company,

vs.

Western Union Telegraph Company.

Know all Men by these Presents:

That we, the Western Union Telegraph Company,
 principal, and J. B. Harris and W. H. Potter, sureties,
 are held and firmly bound unto the Louisville & Nashville
 Railroad Company in the penal sum of \$100.00 for pay-
 ment of which well and truly to be made, we bind our-
 selves firmly by these presents.

The condition of the above obligation is such that
 whereas the above bounded Telegraph Company has prayed
 and obtained an appeal to the Supreme Court from a
 decree rendered in this cause on the 6th day of November,
 1912, now, therefore, if the said Telegraph Company shell
 prosecute its said appeal with effect and abide by said judg-

**THE WESTERN UNION
TELEGRAPH COMPANY.**

Approved November 14th., 1912.

127 Louisville & Nashville Railroad Company

Western Union Telegraph Company.

I, Fred Taylor, Clerk of the Chancery Court of Jackson County do hereby certify that the foregoing one to seventy pages inclusive contain a true and perfect transcript of the original papers and proceedings filed and had in the cause therein stated, as fully and completely, as the same remains of record, and on file in my office.

FRED TAYLOR.

Transcript . . .	\$19.50
Index50
Bond50
Citation50
Certificate50
Binding50
Express50
	<hr/>
	\$22.60

Serving citation, entering and returning 2.00 \$24.60

CITATION TO SUPREME COURT.

State of Mississippi,
Jackson County

To the Sheriff of said County-Greeting:

Whereas, on the 6th day of November A. D. 1912, by judgment of our Chancery Court of Jackson County, in the aforesaid State, motion to dissolve injunction in cause No. 3144 styled Louisville and Nashville Railroad Company, Complainant, against Western Union Telegraph Company, Defendant, Defendant was overruled, and the said Western Union Telegraph Company, having prayed and obtained a writ of error, returnable unto our Supreme Court at Jackson, on the 3rd Monday of January next, and having given bond for supersedeas;

We command you to cite the said Louisville & Nashville Railroad Company, or Smith and Goldsby, its attorney of record to appear then and there in and before Supreme Court, to defend the said Writ of Error, and have then and there this precept before our said Supreme Court.

Witness: The Hon. Robt. B. Mayes.

Chief Justice of our said Supreme Court, the 14th day of December, A. D. 1912.

Witness, Also Fred Taylor, Clerk of our said Chancery Court, and the seal of his Court affixed; the 14th day of December, A. D. 1912.

FRED TAYLOR,
Clerk,

.....
D. C.

Received in office, this 14th day of December, 1912.

FRED L. LINDINGER,
Sheriff Jackson County, Miss.

I have this day executed the within writ by personally handing J. R. Watts, local agent at Pascagoula, Miss., of the within named Louisville and Nashville Railroad Company, a true copy of this writ. This the 14th day of December, 1912.

FRED L. LINDINGER,
Sheriff.

131 Western Union Telegraph Company.
17373 vs. 4062
Louisville & Nashville R. R. Company.—Smith, C. J.

Appellant owns and operates a telegraph line extending along the right of way of appellee's railroad. This telegraph line is maintained by appellant by virtue of a contract entered into by it and appellee. This contract, being about to expire, appellant instituted three separate eminent domain proceedings, one in Jackson County, one in Harrison County, and in one in Hancock County, for the purpose of condemning a right of way for a new line to be erected along appellee's railroad in their counties. Pursuant to the petitions instituted therefor, these eminent domain Courts assembled and judgments were rendered fixing the amount of compensation to be paid by appellant to appellee for the use of its right of way. From these judgments no appeal was taken by either party. Sometime after these judgments were rendered, and before the expiration of the contract under which the appellant was operating its telegraph line along appellee's right of way, appellee filed bill herein, praying that appellant be restrained during the pendency of this suit "from entering upon, or using, otherwise, than under the existing contract between the complainant and defendant, any portion of complainant's said right of way or bridges, hereinabove described, for the purpose of erecting, continuing or maintaining its telegraph poles, wires and other appliances and from attaching its poles, wires and other parts of its lines to complainant's bridges or any part of them, until this cause is finally heard and determined. That at the hearing of this cause, this Honorable Court will be pleased to decree that several judgments of condemnation for the use, by the Western Union Telegraph Co., of parts of the right of way of Complainant, for the erection by the said Western Union Telegraph Co., of its poles, wires and appliances, and of the right to attach its poles, wires and other parts of its line to complainant's bridges or any part of them, to be clouds upon the title of complainant's right of way, for the several reasons assigned in the foregoing bill of complaint, and that this Honorable Court will be pleased to decree said several

condemnation proceedings, and the said several judgments therein to be void and of no effect, and that it will permanently enjoin the said Western Union Telegraph Company from entering upon, taking possession of, or erecting any of its wires, or other appliances upon complainant's bridges or to any of them after the termination, by notice or otherwise, of the contract under which it now occupies said right of way with its telegraph lines."

On the filing of this bill a temporary injunction was granted and thereafter a motion was filed by appellant to "dissolve the injunction heretofore granted in this cause against it, for want of equity on the face of the bill."

This motion was by the Chancellor overruled and from the decree so ordering an appeal was granted to this Court to settle the principals of the case.

Section 1856 of the code provides that the application to exercise the right of eminent domain "shall indorse thereon his appointment of a competent Justice of the Peace of the County in which the property, or some part thereof is situated, to constitute, with a jury, the special Court of eminent domain."

In two of these eminent domain proceedings the appointment of the justice of the peace were not indorsed upon application, but were made in writing upon separate sheets of paper and filed with the papers in the cause. This fact appellee claims renders these judgments void because in the language of its counsel "all of the material requirements of the statute must be literally complied

133 with and such compliance must appear on the face of the record. "The rule as thus announced is not strictly accurate." Every essential pre-

requisites to the jurisdiction called for by the statute must be strictly complied with, and this must affirmatively appear on the face of the proceedings, in order to give them validity, "15 Cyc. 812 *White vs. R. R. Co.* 64 Miss. 566, but "a strict compliance with the statute does not necessarily mean a literal and exact compliance. A substantial compliance will suffice." 1 *Lewis' Eminent Domain*, 3rd Ed. Sec. 387, *White vs. Railroad Co.*, 64 Miss. 566; *Darrow vs. Railroad Co.* 169 Ind. 99; *Nickerson vs. Lynch*, 133 Mo. 481; *Charleston vs. Comstock*, 38 W. Va. 283; *Dodge County vs. Acon*, 61 Nebraska, 376. The

essential requirement of the statute is that the Justice of the Peace shall be appointed in writing and the indorsement thereof upon the application is a mere detail to provide for the more effectual preservation of the evidence of the appointment. The indorsement of the appointment of the Justice of the Peace on the application is not essential to the jurisdiction conferred by the appointment and a failure of the Clerk to indorse the appointment thereon is a mere irregularity not open to review in this proceeding.

In two of the said counties the applications were filed with Deputy Circuit Clerks who thereupon discharged the duties relative thereto imposed upon the Circuit Clerks. Section 1006 of the Code provides "The Clerk of the Supreme Court, the Circuit Court, and the Chancery Court shall have power, with the approbation of the Court, or of the Judges in vacation, to appoint one or more deputies, who shall take oath of office, and who, thereupon shall have power to do and perform all the acts and duties which their principals may lawfully do."

It is argued, however, by counsel for appellee, that
 134 "the acts which the deputies are authorized
 by this Section to do are acts relating to the performance of the duties of the Clerk of the Court *virtuti officio*, and does not include other acts to be done under special authority conferred upon the Clerks by statute." This contention was settled adversely to appellee in *McRaven vs. McGuire*, 9 S. & M. 34 and 23 Miss. 100.

Another reason advanced by counsel for appellee in support of the decree rendered in the Court below is that "Section 929 of the Code of Mississippi, granting to telegraph companies a right to condemn railroad rights of way, when applied to post roads, interferes with the regulation of interstate commerce by Congress, and is, for that reason, void."

The right of appellant to erect and maintain its telegraph line along appellant to erect and maintain its telegraph line along appellee's railroad is not derived primarily from Section 929 of the Code of Mississippi, but from an Act of Congress passed on July 24th, 1866, entitled "An Act to aid the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," which provides "that any telegraph

company now organized, or which may be hereafter organized, under the laws of any State in this Union, shall have the right to construct maintain and operate lines of telegraph through and over any portion of the public domain on [of] the United States, and along any of the military or post roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams of water of the United States."

This statute contains no provision conferring upon telegraph companies the right to obtain by eminent domain proceedings a right of way along the line of a railroad company, and it is argued by counsel for Appellee that it is beyond the power of the State to confer any such right upon them. This point seems not to have been decided by the Supreme Court of the United States, but in *Western Union Telegraph Co. vs. Pennsylvania Railroad Co.*, 195 U. S. 549, 49 L. Ed., 312, the Court, in holding that

the Telegraph Company had no right under this
 135 statute to appropriate any portion of the railroad company's right of way without its consent, referred to the fact that "it is admitted that the statutes of New Jersey (the State in which the litigation arose) do not confer the right of eminent domain upon the telegraph company." The power of a State, however, to confer such a right upon telegraph companies to be exercised by them in making effective the right conferred upon them by the Act of Congress herein question, has been upheld in several cases decided in Federal District and Circuit Courts. *Postal Telegraph & Cable Co. vs. Southern Railroad Co.*, 89 Fed., 109; *Postal Telegraph & Cable Co. vs. Cleveland, etc.*, R. R. Co., 94 Fed. 234, *Postal Telegraph & Cable Co. vs. Oregon etc.* R. R. Co. 104 Fed. 623; *Postal Telegraph & Cable Co., vs. Oregon etc.*, R. R. Co., 114 Fed. 787; *Georgia R. R. Co., vs. Telegraph Co.*, 152 Fed. 991; *Western Union Telegraph Co. vs. L. & N. R. R. Co.*, 201 Fed. 946.

Several of these cases were reviewed in *Western Union Telegraph Company vs. Pennsylvania Railroad Company*, supra, at page 323 of 51 Law Ed. and the Court pointed out that while the opinions rendered contained language supporting the contention that the right of emi-

ment domain was conferred by the Act of Congress in question, that in each of the cases the right was exercised by virtue of the statutes of the State in which the case arose.

We are of the opinion that the State has the power to confer the right of eminent domain here called in question, and that Section 929 of the Code is valid.

But it is said that the bill alleges that it is the intention of appellant to maintain its existing telegraph lines and not to erect a new one, and there ore the injunction should be continued for that reason alone, for conceding that the eminent domain judgments are valid, appellant has no right under the statute to condemn any portion of appellee's right of way for the purpose of maintaining an existing line, but only for the purpose of erecting a new line. We do not understand the bill to be framed on any such theory. As we understand the bill, one of the reasons

136 assigned for holding the eminent domain judgments void is that appellee's purpose in obtaining them was to maintain an existing, instead of erecting a new, line. Conceding that Appellee's purpose in obtaining these judgments was as stated, that fact will not render the judgments void. Should appellant seek to use them as a means for maintaining an existing instead of a new line, its right so to do can be determined in a proper proceeding instituted for that purpose.

We are requested by counsel for appellant to dismiss the bill in event the decree of the Court below is reversed for the reason that no question of fact is to be determined, the sole ground of the motion to dissolve being the want of equity on the face of the bill. This we cannot do because the only final judgment which this Court can render when a judgment is reversed is such as should have been rendered in the Court below and the Court below on the motion to dissolve was without authority to dismiss the bill.

The decree of the Court below will be reversed, the motion to dissolve the injunction will be sustained, and the cause remanded.

In the Supreme Court of the State of Mississippi.
March Term, 1914.

July 6th, 1914.

Western Union Telegraph Company,
16373 vs.
Louisville & Nashville Railroad Company.

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Jackson County, and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein, doth order, adjudge and decree on the 6th day of November, 1912, be and the same is hereby reversed, the injunction dissolved and this cause remanded, and that appellee do pay the costs
137 of this appeal to be taxed, etc.

State of Mississippi:

I, George C. Myers, Clerk of the Supreme Court of the State of Mississippi, hereby certify the foregoing and annexed seventy-two (72) pages to contain a full, true and correct copy of the transcript of the record filed in said Supreme Court in the case of the Western Union Telegraph Company, vs. Louisville & Nashville Railroad Company, filed in said Supreme Court from the Chancery Court of Jackson County, Mississippi, together with a copy of the opinion of said Supreme Court and the final decree of said Supreme Court rendered in said cause on the 6th day of July, 1914, as the same remain on file and of record in my office.

Given under my hand and the seal of said Supreme Court at office in the City of Jackson, Mississippi, this the August 17th, 1914.

GEO. C. MYERS,
Clerk.

(Seal)

By W. J. BROWN, D. C.

(Following appears on back as follows:)

Exhibit "B" to Answer. Filed Aug. 19, 1914. Filed
as ex.c. 3/17/15.

138 United States District Court for the Southern
Division of the Southern District of Mississ-
ippi.

Louisville & Nashville Railroad Company,
vs. No. 117.
Western Union Telegraph Company.

To the Honorable Henry C. Niles, Judge of the United
States District Court for the Southern Division of
the Southern District of Mississippi.

Complainant, the Louisville & Nashville Railroad Com-
pany, by leave of this Honorable Court first granted, files
this, its supplemental bill of complaint, in the cause pend-
ing, in this Honorable Court, Numbered, and com-
menced by the filing of its original bill of complaint against
the Western Union Telegraph Company on the 27th day
of April, 1912, and shows to your Honor:—

That the right of the Western Union Telegraph Company
under its contract with complainant, the Louisville &
Nashville Railroad Company, to maintain its poles, wires
and other telegraphic appliances upon complainant's
right of way expired pursuant to the notice averred in
complainant's original bill of complaint, on August 17th,
1912, and that the Western Union Telegraph Company
has never claimed, nor does it now claim, any right or title
to maintain or operate its said poles, wires and other tel-
egraphic appliances upon complainant's said right of way,

139 save under and by virtue of said several condemna-
tion proceedings set out and averred in complain-
ant's original bill of complaint, and the said
Western Union Telegraph Company has not, since
said 17th day of August, 1912, constructed any new tel-
egraph line upon said right of way, but it has maintained
and operated, and still maintains and operates upon said
right of way, a telegraph line that it had constructed and
operated upon said right of way prior to, and that it was
maintaining and operating upon said right of way at the
time that, said condemnation proceedings were instituted
and prosecuted.

To the end, therefore, that equity may be done in the premises, Complainant prays that the defendant be required to answer this, its bill of complaint in the time required by the rules and practice of this Honorable Court, and that, pending the hearing of this cause, your Honor will be pleased to grant to complainant, a temporary injunction, restraining and enjoining the defendant, the Western Union Telegraph Company, from maintaining and operating upon the rights of way of the complainant, during the pendency of this suit, its said poles, wires and other telegraphic appliances which it had constructed, maintained and operated, and was maintaining and operating upon said rights of way at the time that its right to maintain and operate the same under a contract with the complainant expired, viz; on August 17th, 1912, and that, at the final hearing of this cause, Your Honor will be pleased to grant the Complainant, in addition to the relief sought by its original bill of complaint, a permanent injunction, enjoining and restraining the defendant from constructing, maintaining or operating upon complainant's said right of way, said poles, wires and other telegraphic appliances constituting in whole or in part, the defendant's line of telegraph existing and being operated at the expiration of the said contract between the complainant and the defendant, which expired on the 17th day of August, 1912, and will require defendant to remove said
140 telegraph line from complainant's said right of way.

Complainant prays that Your Honor will grant to it such other and further relief as it may be entitled to in the premises, and as in duty bound, it will ever pray, etc.

GREGORY L. SMITH,
HENRY L. STONE,
JOEL W. GOLDSBY,
Solicitors for Complainant.

Following appears on back: Supplemental Bill. Filed, Aug, 17th, 1914.

141 In the District Court of the United States for
the Southern Division of the Southern Dis-
trict of Mississippi.

Louisville & Nashville Railroad Company
vs.

Western Union Telegraph Company.

For answer to the Supplemental Bill filed in this cause
by Complainant herein on the 17th day of August, 1914,
the Defendant would respectfully show:

That on the 19th day of November, 1912, there being
at that time pending sundry condemnation proceedings
instituted by it in the several States through which its
line of poles and wires were constructed along the right
of way of the Defendant Railroad, including the State
of Mississippi, the proceedings in the State of Mississippi
being the same proceedings which are referred to and
made the basis of the original bill in this cause;

That on or about August 7th, 1912, the Complainant
herein gave written notice to the Defendant to begin not
later than September 1st, 1912, to remove its poles, cross-
arms, wires, batteries, instruments, appliances and other
fixtures composing its telegraph line from the right of
way of the Complainant, and that if said poles, cross-
arms, etc., were not entirely removed by December 1st,
1912, it, the Complainant, would take possession of,
appropriate and use all and singular the said poles, cross-
arms, etc.; that at the time said notice was given, condem-
nation proceedings were pending as aforesaid in the several
States, including the State of Mississippi, the proceed-
ings in Mississippi being the same which formed the basis
of the Bill of Complaint herein, and the said notice was
intended and did refer and relate to the said
proceedings in the State of Mississippi;

142 That thereafter, to-wit: On the 19th day of
November, 1912, this Defendant filed its Bill of Complaint
in the District Court of the United States for the Western
Division of Kentucky, setting forth the pendency of
the said condemnation proceedings and notice aforesaid,
and prayed a temporary injunction against the Defendant,

enjoining and restraining it from interfering in any way with its poles and wires while said proceedings were still undetermined, and that on the 28th day of December, 1912, after a full hearing, the prayer of the Bill of Complaint was granted, and an injunction awarded against the Complainant herein, enjoining it and restraining it from taking possession of or interrupting the said Defendant in the use of its poles and wires and other apparatus along the line of the Louisville & Nashville R. R. Co., including the line of said Railroad Company, extending through the State of Mississippi from the Alabama line to the Louisiana line, the same being the right of way referred to and embraced and forming the basis of the Bill of Complaint herein, the said injunction to be in force for six months from the date thereof or until further order of the Court with power in the Court from time to time to enlarge such designated period as may be equitable. Certified copy of the order of Injunction is herein filed and marked Exhibit "A" to the Answer;

That an appeal was taken by the Complainant from the decree of the District Court to the Circuit Court of Appeals for the Sixth Circuit and there the decree of the District Court was affirmed, on the day of July, 1913. For more convenient reference the Court is referred to full report of said case as same appears in 207 Fed. Rep. at pages 1 to 18.

The Defendant would show that the said In-
 143 junction was from time to time extended and enlarged by the District Court of the United States for the Western Division of Kentucky, and that the same was enlarged and extended on the 19th day of September, 1914, to remain in full force until further order of the Court. A certified copy of said order of extension is filed herein and marked Exhibit "B" to this answer;

In view thereof, of the existence of said Injunction, and the premises herein, the Complainant is not entitled to maintain the said Supplemental Bill or to the relief sought without violating said Injunction, and Defendant prays that said Supplemental Bill be dismissed.

.....
 Attorneys for Defendant.

ORDER.

United States Court, Western District of Kentucky.

Western Union Telegraph Company, Complainant,
vs.

Louisville & Nashville Railroad Company, Defendant.

The Court being advised, upon the motion of the complainant herein for a temporary injunction, delivered a written opinion, which is now ordered to be filed and made a part of the record.

And thereupon it is ordered that the Louisville & Nashville Railroad Company, its officers, agents and servants for six months from this date, or until the further order of the Court, with the power in the Court from time to time to enlarge such designated period as may be equitable, are enjoined and restrained from taking possession of or interrupting the complainant in the use of any of its poles, wires or other apparatus situated upon the right of way of the defendant, Louisville & Nashville Railroad Company, upon the following lines of railroad of said defendant, namely;

A line of Railroad from Cincinnati, Ohio, through the State of Kentucky to Louisville, Kentucky, thence through the State of Kentucky to Nashville, Tennessee, thence south to Decatur, Alabama, thence south to Montgomery, Alabama, thence south to Mobile, Alabama, thence southwest to New Orleans, Louisiana; also a line of railroad beginning at Covington, Kentucky, and running thence south through the State of Kentucky and the State of Tennessee to Knoxville, Tennessee, thence through Tennessee and Georgia, to Marietta and Junta, Georgia; and a belt road through the City of Atlanta, Georgia; also a line of railroad from St. Louis, Missouri, running thence southeast to Evansville, Indiana; thence south, through Henderson, Kentucky, crossing the State of Kentucky, to Edgefield Junction, near Nashville, Tennessee, where it joins the first named line above described; also a line of railroad branching from the main line first above described, at Bardstown Junction, Kentucky, and running to Springfield, Ken-

tucky; another branch from Lebanon Junction, Kentucky, southeast through Kentucky to Livingston, where it joins the second main line above mentioned, and turning off from the second main line at Corbin, thence southeast and northeast to Norton in the State of Virginia; also a line of railroad branching from the main line first above described, at Memphis Junction near Bowling Green, Kentucky, thence southeast to Memphis, Tennessee; also a line of railroad from Owensboro, Kentucky, to Adairville, Kentucky; also a line of railroad from Columbia, Tennessee, to Sheffield, Alabama, and from Gadsden, Alabama, to Birmingham, Alabama, and from Birmingham, Alabama, to Tuscaloosa, Alabama; also a line of railroad from Georgiana, Alabama, to Graceville, Florida, and from Flomaton, Alabama, to Pensacola, Florida, and thence to River Junction, in the State of Florida; and also all branches and spurs from any of these lines owned by the defendant, Louisville & Nashville Railroad Company, and upon which the poles and wires of the Complainant are now situate, but not including any line of railroad in North Carolina.

It is ordered that this order is to be construed as requiring both parties to maintain the present status, but not to forbid the defendant from building any line which does not interrupt the service of Complainant's line, nor the Complainant from repairing and maintaining its line.

This order shall be of no further force or effect unless the Complainant shall, within three days, execute a bond in a penalty of seventy-five thousand (\$75,000.00) dollars,

146 with surety to be approved by the Court, conditioned to pay the defendant all damage which it may suffer by the suing out or continuing of this Injunction. The defendant move the Court to fix the penalty of this Bond in the sum of two hundred and fifty thousand (\$250,000.00) dollars, and the Complainant moves the Court to fix the penalty of said Bond in the sum of fifty thousand (\$50,000.00) dollars, but the Court overruled both of said motions and fixed the penalty of the bond as above recited.

United States of America,
Western District of Kentucky.

I, A. G. Ronald, Clerk of the District Court of the United States, for said Western District of Kentucky, do hereby certify the above and foregoing to be a true and complete copy of the Order entered in said Court, on the 28th day of December, A. D. 1912, in the cause wherein Western Union Telegraph Company is the Complainant, and The Louisville & Nashville Railroad Company is the Defendant, as the same appears from the original now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affix the seal of said Court, this 31st day of December, A. D. 1912.

[Seal]

A. G. RONALD, Clerk.
HENRY F. CASSIN, D. C.

147

ORDER.

No. 105.

In the District Court of the United States for the Western
District of Kentucky.

Western Union Telegraph Company, Complainant,
vs.

Louisville & Nashville Railroad Company, Defendant.

It appearing from the record that an order was entered herein on the 28th day of December, 1912, upon motion of the Complainant, granting a temporary injunction for six months, from said date until the further order of the Court, "with power in the Court from time to time to enlarge such designated period as may be equitable," which order was thereafter extended until June the 28th, 1914, and the Complainant having now tendered the affidavit of Chas. Smith, which is now ordered filed; and it having been shown to the Court that the condemnation proceedings set out in the bill of complaint as amended are still pending in the Courts of the several States mentioned in the bill of complaint as amended.

148 United States of America,
Western District of Kentucky.

In testimony whereof I have hereto set my hand and affix the seal of said Court, this the 19th day of September, A. D., 1914.

A. G. RONALD, Clerk.
By GEO. W. RONALD, D. C.

This cause coming on to be heard on the motion of the defendant to allow it a reasonable attorneys fee by way of damages for the wrongful suing out of the writ of injunction herein, and to dismiss this cause, and upon the motion of the Complainant to dismiss the same without prejudice, it being agreed that both motions should be tried together, and the Court having heard the evidence

on the question of damages and being of the opinion that the amount claimed seven hundred and fifty is a reasonable solicitor's fee:

It is therefore ordered and decreed that the Western Union Telegraph Company do have, and recover of from the Louisville & Nashville Railroad Company, and the National Surety Company of New York, surety upon its injunction bond, the sum of seven hundred and fifty dollars, with interest, at legal rate from this date, until paid.

It is further ordered and decreed that this cause be, and the same is hereby dismissed, but without prejudice, to the right of the Complainant, the Louisville & Nashville R. R. Co., to challenge or dispute, the power, or right of the Western Union Telegraph Company, to enter upon or maintain any line which is not a new line of telegraph within the meaning of the eminent domain Statute of Mississippi, along any of the property of the said Railroad Company under and by virtue of the eminent domain judgment brought in question in this cause.

It is further ordered that the complainant pay the costs of Court in this behalf expended, for which let execution issue as at law.

Ordered and decreed, this the 20th day of November, 1914.

(Signed)

J. M. STEVENS, Chancellor.

Exhibit "B".

150 The State of Mississippi.

To the Honorable the Chancery Court of Jackson County—
Greeting:

Whereas, on the 7th day of July, 1914, the same being a day of the regular term of our Supreme Court, begun and held in the Court Room in the capitol, in the City of Jackson, in said State, on the 1st Monday of March in the year of our Lord, 1914, the following final decree was rendered by our Supreme Court, to-wit:

You are therefore hereby commanded, That such execution and further proceedings be had in said cause, as according to right and justice, the judgment of our Supreme Court and the law of the land ought to be had.

Witness, the Hon. Sydney Smith, Chief Justice of our Supreme Court; also the signature of the Clerk, and the Seal of said Court, hereunto affixed at office, at Jackson, this the 21st day of September, A. D. 1914.

(Signed) **GEO. C. MYERS, Clerk.**

(L. S.)

Exhibit "A".

151 The State of Mississippi,
 Jackson County.

I, Fred Taylor, Clerk of the Chancery Court in and for said County, do hereby certify that the foregoing instrument of writing contains a full, true and complete transcript of and from the original of same, as appears of file and of record in my said office.

Given under my hand and seal of office, this the 17th day of February, A. D. 1915.

[Seal]

FRED TAYLOR, Clerk.

10c. Documentary stamps.

Following appears on back: Exhibit (No. 1) to Amendment to Answers. Filed Feb. 18, 1915.

152 AMENDMENT TO THE ANSWER TO THE
ORIGINAL BILL FILED BY LEAVE
OF THE COURT.

United States of America.

In the Dist. Court for the So. Div. of So. Dist. of Miss.

The Louisville & Nashville R. R. Co.

vs.

Western Union Telegraph Company.

In addition to the matter set up in its answer to the original bill, the defendant would state that, after the filing of said answer to writ on the 20th day of November, 1914, the Chancery Court of Jackson County, Mississippi, made an order dismissing the bill of complainant filed by the complainant, in said Court, and awarded damages to the defendant for the wrongful suing out of the injunction therein. A certified copy of said decree is filed herewith, as Exhibit "No. 1" to this amended answer, and prays the Court to consider the same in connection with the said original answer. And renews its prayer that the bill of complaint be dismissed.

And the defendant dismissed with its reasonable costs.

THE WESTERN UNION TEL-
GRAPH COMPANY,

By J. B. HARRIS, its Atty.

Following appears on back: Amended Answer.

153 MOTION TO DISMISS THE ORIGINAL AND
SUPPLEMENTAL BILL.

United States of America, in the Dist. Court for the So.
Div. of the So. Dist. of Miss.

Louisville & Nashville Railroad Company,
vs.
Western Union Telegraph Company.

Comes the defendant, by its attorney, and moves the Court to dismiss the bill of complaint herein, for the reason that the merits of the cause have been fully adjudicated adversely to the complainant in a proceeding instituted by the Complainant in the Chancery Court, of Jackson County, State of Mississippi, and by a judgment of the Supreme Court of the State of Mississippi, on appeal from the decree in the cause rendered by the said Chancery Court of Jackson County, all of which is fully set out in the answer to the original bill.

And further that the supplemental bill be dismissed for the reason that the same is filed in violation of an injunction as set forth in said answer to the said supplemental bill.

J. B. HARRIS,
Atty. for the defendant.

Following appears on back: Motion to Dismiss the Original and Supplemental Bills. Filed Feb. 18th, 1915.

154 DECREE DISMISSING THE ORIGINAL
AND SUPPLEMENTAL BILL.

United States of America, in the Dist. Court of the U. S.
for the So. Div. of So. Dist. of Miss.

Louisville & Nashville Railroad Co.

vs.

Western Union Telegraph Company.

This cause coming on on this day to be heard on the original bill and answer and amended answer thereto, and the supplemental bill and the answer thereto, and the Exhibits thereto, and the motion of the defendant to dismiss the said original and supplemental bills, and the evidence offered in support of said motion, and the Court having fully considered the said defendants motion:

It is therefore ordered adjudged and decreed that the original bill of complaint and the supplemental bill here be, and the same is dismissed, and it is further ordered that the complainant pay the costs herein affixed for which let execution issue.

Ordered, adjudged and decreed this the 18th day of Feb., 1915.

H. C. NILES, Judge.

Following appears on back: Decree Dismissing the Original and Supplemental Bill. Ent. E. J. 1 p. 77, Feb. 18th, 1915, and filed.

155 Louisville & Nashville Railroad Company,

vs.

Western Union Telegraph Company.

Upon motion of complainant it is considered ordered and decreed that complainant be and it is hereby allowed sixty days from this the 18th day of Feb., 1915, within which to prepare and present for the signature of the Judge a bill of exceptions, and other proper certificate of procedure in said cause, for the purpose of properly

presenting for review upon appeal the rulings of the Court in said cau e.

Made this the 18th day o^r February, 1915.

H. C. NILES, Judge.

Following appears on back: Order Allowing 60 days to File Bill of Exceptions. Ent. E. J., Feb. 18, 1915, p. 77, and filed.

156 In the United States Court for the Southern Division of the Southern District of Mississippi.

It is hereby agreed by and between the complainant and the defendant in the above entitled cause that the Clerk shall omit from the record, to be prepared for the purpose of an appeal to the United States Circuit of Appeals for the Fifth Judicial Circuit, all of Exhibit "E" "2" to the statement of proceedings and evidence made for the purposes of appeal except the following portions thereof:

The title of the pamphlet marked Exhibit "2" as shown by the printing upon the back thereof; pages one (1) to eleven (11) inclusive of said pamphlet, containing the cap—of what purports to be the record and the original bill of complainant therein set out, without exhibits; also, so much of page three-hundred-five, (305) as commences with these words: "And on December 12th, 1912, the following proceedings were had" and continuing through page three-hundred-six (306).

Made, this the 24th day of March, 1915.

GREGORY L. SMITH,

Solicitor for the Louisville & Nashville Railroad Company.

J. B. HARRIS,

Solicitor for Western Union Telegraph Co.

The following appears on the back: Agreement of Counsel. As to Omissions from record. Filed March 24th, 1915.

157 STATEMENT OF THE PROCEEDINGS AND
EVIDENCE UPON WHICH SAID CAUSE
WAS TRIED ON FEBRUARY 18th, 1915.

In the District Court of the United States for the Southern Division of the Southern District of Mississippi.

Louisville & Nashville Railroad Company, Complainant.

vs.

Western Union Tel. Company, Defendant.

On this, the 18th, day of February, 1915, being a day of regular term of said Court, came the parties by their Solicitors, and said cause being called for trial, the following proceedings were had therein;

The Western Union Telegraph Company filed the following motion,

"United States of America,

In the District Court for the Southern Division of the District of Mississippi.

The Louisville and Nashville Railroad Company

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vs.

Western Union Telegraph Company.

Motion to dismiss the original and supplemental bills.

Comes the defendant, by its attorney, and moves the Court to dismiss the bill of complaint herein for the reason that the merits of the cause have been fully adjudicated adversely to the Complainants in a proceeding instituted by the Complainant in the Chancery Court of Jackson County, State of Mississippi, and by a judgment of the Supreme Court of the State of Mississippi on appeal from the decree in the cause rendered by the said Chancery Court of Jackson County all of which is fully set out in the answer to the original bill.

And further, that the supplemental bill be dismissed for the reason that the same is filed in violation of an injunction as set forth in said answer to the supplemental bill.

J. B. HARRIS,

Atty. for the Defendant for
the motion."

The Western Union Telegraph Company, by leave of the Court then filed the following amendment to its answer to the original bill of complaint, viz:

United States of America

In the District Court of the United States for the Southern
Division of the Southern District of Mississippi.

Louisville and Nashville R. R. Co.,

vs.

Western Union Telegraph Company.

Amendment to the answer of the original bill filed by
leave of Court.

In addition to the matters set forth in its answer
159 to the original bill, the defendant would show
that after the filing of said answer, to-wit: On
the 20th day of November, 1914, the Chancery Court of
Jackson County, Mississippi, made an order dismissing
the bill of complaint filed by the by the complainant in said
State Court and awarded damages to the defendant for
the wrongful suing out of the injunction therein. A cer-
tified copy of said decree is filed herewith as Exhibit No. 1
to this amended answer and prays the Court to reconsider
the same in connection with the said original answer and
renews its prayer that the bill of complaint and the de-
fendant be dismissed with its reasonable costs.

WESTERN UNION
TELEGRAPH COMPANY,

By J. B. HARRIS,

Its Attorney."

The Western Union Telegraph Company's solicitor then announced that he offered in evidence the record of the Supreme Court of Mississippi, filed "Exhibit "B" to defendant's answer to the original bill of complaint, and a decree of the Chancery Court of Jackson County, Mississippi, which was Exhibit No. 1 to his amended answer;

The Exhibit "B" to the answer was entirely in typewriting with the exception of what purported to be the signature of George C. Myers. This signature appeared to be in hand writing.

Every part of the second paper, Exhibit "1", was in typewriting.

The Louisville & Nashville Railroad Company's solicitor objected to the introduction of Exhibit "B", upon the ground that the questions presented by the bill of complaint were not presented for adjudication by the record contained in Exhibit "B", and were not adjudged in said cause by the Supreme Court of Mississippi; that the sole question adjudicated in that case was that the motion to dissolve the injunction, made in the Chancery Court, should have been sustained by that Court.

The Court overruled the Louisville & Nashville Railroad Company's objection, and to this ruling the Louisville & Nashville Railroad Company excepted.

The Louisville & Nashville Railroad Company separately objected to so much of the paper of which Exhibit "1" is a copy as purports to be a decree of the Chancery Court, upon the ground that it was not properly authenticated as a final decree of said Court.

The Court overruled the Louisville & Nashville Railroad Company's objection, and the Louisville & Nashville Railroad Company excepted.

The Western Union Telegraph Company then offered in evidence a pamphlet, every part of which was in print, and a fac-simile of which is herewith filed, marked Exhibit "2" and made a part hereof.

The Louisville & Nashville Railroad Company's solicitor objected to the introduction of this pamphlet as evidence on the ground that it was not shown that it was not a record of any kind, there being no certification as a record, and because it was irrelevant and immaterial.

The Court overruled this objection, and the Louisville & Nashville Railroad Company excepted.

The Western Union Telegraph Company then read in evidence Exhibits "A" and "B" to its answer to the supplemental bill of complaint.

This was all of the evidence offered upon the hearing of said motion, and thereupon, said motion having been argued by the counsel and considered by the Court, the Court rendered the following decree:

161 DECREE DISMISSING THE ORIGINAL
AND SUPPLEMENTAL BILLS.

United States of America.

In the District Court of the United States for the Southern
Division of the Southern District of Mississippi.

Louisville and Nashville Railroad Company

vs.

Western Union Telegraph Company.

This cause coming on this day to be heard on the original bill and answer and amended answer thereto and the supplemental bill and the answer thereto and the motion of the defendant to dismiss the original and supplemental bills and the evidence offered in support of said motion and the Court having fully considered the same, sustained the said defendants motion.

It is therefore, ordered, adjudged and decreed that the original bill of complaint and the supplemental bill here be and the same is dismissed, and it is further ordered that the complainant pay the costs herein to be taxed, for which Ist. [let] execution issue.

Ordered, adjudged and decreed this the 18th day of February, 1915.

H. C. NILES,
Judge.

To said decree, the Louisville and Nashville Railroad Company excepted, and now presents this, as its statement of the preceedings in evidence upon the hearing of the motion of the Western Union Telegraph Company to dismiss the bill of complaint of the Louisville and Nashville Railroad Company in said cause.

GREGORY L. SMITH,
H. L. STONE,
Solicitor for the Louisville &
Nashville Railroad Company.

162 It appearing that the foregoing statement was prepared by the solicitor for the Louisville and Nashville Railroad Company for the purpose of an appeal from the decree of this Court, and was lodged with the Clerk of the United States District Court for the Southern Division of the Southern District of Mississippi, on the 9th day of March 1915; and that said solicitor notified the solicitor of the Western Union Telegraph Company that on the 24th day of March, 1915, at Koscuisko, Miss., he would ask the Judge of said Court to approve the same and said statement having been duly presented to me, the said Judge, at said time and place, together with certain objections and amendments proposed by the solicitor for the Western Union Telegraph Company, and said statement having been found to be true, complete and properly prepared, is hereby approved, this the 24th day of March, 1915.

H. C. NILES,
Judge of the United States District Court for the Southern Division of the Southern District of Mississippi.

The following appears on the back:
Statement of Proceedings and allowance thereof. Filed,
March 9th, 1915.

163 PROCEEDINGS OF THE DISTRICT COURT
 OF THE UNITED STATES FOR THE
 WESTERN DISTRICT OF KENTUCKY,
 AT A REGULAR TERM BEGUN AND
 HELD AT THE FEDERAL COURT HALL
 IN THE CITY OF LOUISVILLE, ON
 MONDAY, OCTOBER 14, 1912.

Present: Honorable Walter Evans, Judge of the United States District Court for said District.

Western Union Telegraph Company, Complainant,

vs.

Louisville & Nashville Railroad Co. Defendant.

Be it remembered that heretofore, to-wit, on the 19th day of November, 1912, came the complainant by counsel and filed in the Clerk's office of our said Court its Bill of Complaint in the above entitled cause.

The Bill of Complaint above referred to is as follows:

United States District Court, Western District of Kentucky.

Western Union Telegraph Co. Complainant.

vs.

Louisville & Nashville R. R. Co. Defendant.

To the Honorable the Judges of the District Court of the United States for the Western District of Kentucky:

The Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, and a citizen and resident of the said State, having its principal place of business in the State of New York, in the Southern District thereof, brings this its Bill of Complaint against the Louisville & Nashville Railroad Company, a corporation created and existing under the laws of the State of Kentucky, and a citizen and resident of said State, having its principal place of business in the City of Louisville, State of Kentucky, which is within the boundaries of the Western District of the said State of Kentucky, and thereupon your complainant says:

1. That this case is one wholly between
 164 citizens of different States, and that the subject-
 matter thereof and the amount in controversy
 is of the value of more than three thousand dollars, ex-
 clusive of interest and costs, and is also one arising under
 the Constitution and laws of the United States.

2. That your Complainant, Western Union Telegraph
 Company is a telegraph company and a corporation duly
 organized and existing under an Act of the Legislature
 of the State of New York, entitled "An Act to provide for
 the incorporating and regulating of telegraph companies,
 passed on the 12th day of April, 1848, and certain Acts
 amendatory thereof and supplemental thereto.

3. That the Defendant Louisville & Nashville Railroad
 Company, organized and existing under the laws of the
 State of Kentucky, and is the owner of a large system of
 railroad lines extending through the States of Kentucky,
 Tennessee, Alabama, Mississippi, Louisiana, and Georgia.

4. That your complainant was thus organized as a
 telegraph company in the year 1851, and immediately
 thereafter began the work of construction and operation
 of telegraph lines in the State of New York, and other
 States, and has continuously since then been engaged in
 the work of constructing, maintaining and operating tel-
 egraph lines, from year to year enlarging its system, so
 that at all the times hereinafter mentioned it has con-
 structed and acquired and was maintaining and it continues
 to maintain, a continuous system of telegraph lines which
 now extends to all the States and Territories of the United
 States and into portions of the Dominion of Canada, and
 connect with telegraph lines in the Republic of Mexico
 and through the land line of Mexico with telegraph lines
 of the Central and South American Republics, and by
 means of submarine cables, with the telegraph systems
 of foreign countries; that at the present time its
 165 system of telegraph lines operated and controlled
 by it comprises more than two hundred thousand
 miles of poles and cables, and approximately one million
 miles of wire; that it transmits yearly many millions of

messages for the public and for the Government of the United States, and for the Governments of foreign countries that its system of lines has been built up so as to connect with and be largely operated from the central office of your complainant, which is situated in the City of New York, State of New York, and the said lines radiate therefrom to all of the important cities and commercial centers and to many thousand towns and villages in the United States and in North America, and through the ocean cables and land lines to all the important commercial centers of this continent and the continent of Europe; that among the lines of telegraph forming an important part of said system of your complainant, and connected with its main office as aforesaid, in the City of New York, and connecting with other lines of telegraph leading to the important commercial centers of the South and Southwest, are the lines of telegraph over and along lines reaching from the Northern States to the Southern States and to the Southwestern States and through those lines to Mexico and Central and South American countries.

5. That said lines of telegraph along the railroad of the Louisville & Nashville Railroad Company were originally constructed more than forty years ago and have been maintained and operated for many years under an agreement entered into by and between your complainant and the said Louisville & Nashville Railroad Company, the details of which will be hereinafter more fully stated.

6. That said lines of telegraph owned by your complainant have been maintained and operated along and over said lines of railroad of the defendant at all the times herein mentioned, and are maintained and operated at 166 the present time, so as not to interfere with the ordinary use and operation of said railroad and the ordinary travel thereon, being situated near the outer limits of the right of way of said railroad and in such manner as not to disturb, interfere with, delay or endanger the operation of the said railroad or the ordinary travel upon said railroad, and that as now located and maintained and operated said lines can continue to be so maintained and operated as not to interfere with the future operation

and maintenance of said railroad or the ordinary travel upon said railroad, subject only to such slight changes in the location of some of the poles of said lines as may be incident to the construction of additional tracks upon said right of way or the shifting of tracks already existing upon said right of way, necessitating the removal at some point or points of some of the structures connected with said telegraph lines, which removal or removals your complainant has always been and is now ready to make.

7. That all the telegraph lines along and upon the lines of railroad owned, controlled and operated by the defendant have been constructed thereon with the express consent of the defendant or of its predecessors in title and estate, with the well understood purpose that the same should form part of and be connected with the other lines of telegraph belonging to your complainant, and with the knowledge of the said defendant that said lines, when erected, were to become a part of the general system of telegraph lines owned, operated and controlled by your complainant; that the said lines of telegraph have been at all times operated and maintained not only as connected with all the lines of telegraph along and upon the said system of railroads owned, operated and controlled by the defendant, but also as an integral part of the general system of telegraph lines owned, controlled and operated by your complainant within the United States and the Dominion of Canada, and with the other lines
 167 connected therewith, as hereinbefore fully set forth.

8. That the Congress of the United States passed an Act, approved July 24, 1866, and entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes," and that, complying with the provisions of said Act of Congress, your complainant did, on or before the 8th day of June, 1867, duly file its written acceptance, with the Postmaster General of the United States, of the restrictions and obligations of said Act, and that thereupon your complainant became entitled to all the rights and privileges conferred by said Act, and burdened by all the ob-

ligations imposed thereby, and that it has continuously since the filing of its said written acceptance fully performed and at the present time is fully performing, all of the obligations and requirements of said Act.

9. That in compliance with an Act of Congress approved June 10, 1872, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1873, and for other purposes," and Acts amendatory thereof, your complainant has carried for the Government of the United States, over lines situated along and over the lines of railroad of the defendant, and its other telegraph lines connected therewith, at rates far below the reasonable rates charged to and paid by individuals or the public for similar services, communications relating to the signal service from the various stations maintained by the Government of the United States throughout the interior of the continent and along the seaboard.

10. That by legislation of Congress, and particularly by Section 2 of an Act of March 3, 1853, and
168 by a subsequent Act approved June 8th, 1873, all railroads or parts of railroads which were then or might thereafter be in operation were declared to be post-roads.

11. That as of June 18, 1884, the defendant, the Louisville & Nashville Railroad Company, owned, operated and controlled a large system of railroad, upon which has been erected the poles, wires, and other apparatus necessary to the conduct of a telegraph business and which belonged at that time to the complainant; that upon that date a contract was entered into between the complainant and the defendant, a copy of which is filed herewith marked "Exhibit A", and is asked to be taken as a part hereof. The said contract recited the railroads then owned by the defendant in fee, the lines of road leased to it, and the lines of road controlled by it. Provision was made in said contract for the maintenance of the apparatus of the complainant, including its poles and wires upon the right of way of all of said railroads, and the term upon which

its business of telegraphing should be conducted. It was provided by said contract that it was intended to cover and should include any branch or branches that might be constructed by the defendant or other railroad or railroads that might be acquired by it either by lease or purchase, or that might be controlled or operated by it during the existence of said agreement, should it be lawfully competent to include it or them. On August 17th, 1911, the system of railroads owned, operated and controlled by the defendant and which came within the terms of said contract, included, among others, the following to-wit: A line of railroad from Cincinnati, Ohio, through State of Kentucky, to Louisville Kentucky, thence south, through the State of Kentucky to Nashville, Tennessee, thence

South to Decatur, Alabama, thence south to 169 Montgomery, Alabama, thence south to Mobile, Alabama, thence southwest to New Orleans, Louisiana; also a line of railroad beginning at Covington, Kentucky, and running thence South, through the State of Kentucky and the State of Tennessee, to Knoxville, Tennessee, thence through Tennessee and Georgia to Marietta and Junta, Georgia; also a line of railroad from St. Louis, Missouri, running thence southeast to Evansville, Indiana, thence south, through Henderson, Kentucky, crossing the State of Kentucky, to Edgefield Junction, near Nashville Tennessee where it joined the first named line above described; also a line of railroad branching from the main line first above described; also a line of railroad branching from the main line first above described at Bardstown Junction, Kentucky, and running to Springfield, Kentucky; another branch from Lebanon Junction, Kentucky, southeast through Kentucky to Livingston, where it joined the second main line above mentioned, and turning off from the second main line at Corbin, thence southeast and northeast to Norton in the State of Virginia; also a line of railroad branching from the main line first above described, at Memphis Junction near Bowling Green, Kentucky, thence southwest to Memphis, Tennessee; also a line of railroad from Owensboro, Kentucky, to Adairville Kentucky; also a line of railroad from Columbia, Tennessee, to Sheffield, Alabama; also a line of railroad from Calera, Alabama to Gadsden, Alabama,

and from Gadsden, Alabama, to Birmingham, Alabama, and from Birmingham, Alabama to Tuscaloosa, Alabama; also a line of railroad from Georgiana, Alabama, to Graceville, Florida, and from Flomaton, Alabama, to Pensacola, Florida, and thence to River Junction in the
 170 State of Florida. Besides the lines named, the system of the defendant includes various small branches from all these lines.

12. That on said August 17th, 1911, there were situated upon the right of way of all these railroads the poles, wires and other apparatus of the complainant, and the operation thereof was being governed by the said contract. On that date, the complainant gave notice to the defendant that within a year thereafter said contract would cease and determine.

13. Notice having been given of the termination of said contract as aforesaid, negotiations were begun between complainant and defendant, the complainant endeavoring to acquire from the defendant the right to continue to occupy with it's poles, wires and other apparatus, the right of way of the various lines above mentioned, for a consideration to be agreed between the parties, but the defendant refused to agree to the acquisition by the complainant of the said right to maintain its poles, wires and other apparatus upon the right of way of the said several lines of railroad, and thereupon the complainant was compelled to resort to legal proceedings to obtain such a right.

14. That on December 21st., 1911, the Complainant instituted in the County Court of Jefferson County, Kentucky a proceeding to condemn the right to maintain it poles, wires and other apparatus upon the right of way of all railroad lines above described, situated in the State of Kentucky. Resistance was made by the defendant to said effort upon the part of the complainant, and the defendant insisted that there was in the complainant no
 171 right of condemnation. The Judge of the Court having jurisdiction of the matter overruled the contentions of the defendant, and thereupon the

said defendant filed a suit in the Jefferson County Circuit Court for a writ of prohibition upon the Judge of the Court of first instance aforesaid, to prevent him from further trying the cause. Before this matter came on to be heard, to-wit: On April 13th, 1912, the complainant dismissed the proceeding in the County Court of Jefferson County, because it was apparent that it would be greatly delayed in bringing such proceeding to a conclusion, and thereupon it filed its suit in this Court, on July 9th 1912, for the purpose of condemning the right to maintain its poles, wires and other apparatus, as aforesaid, over all of the said lines in the State of Kentucky as aforesaid, making the process returnable to the first term of this Court, and since then the complainant has been diligently pursuing the said cause.

15. That the complainant has instituted similar suits against the defendant, for a similar purpose, in Tennessee, Alabama, Louisiana, Georgia and Florida, and it is through such proceedings, which it is diligently pursuing, attempting to condemn the right to maintain its poles, wires and other apparatus upon the lines of the defendant, Louisville & Nashville Railroad Company, in said several States.

16. That the lines above described are all owned by the defendant except that (a) the line from East St. Louis, through the States of Illinois and Indiana, to Evansville, Indiana, is owned by a corporation called the St. Louis & Southeast Railroad Company, all of whose
172 stock, however, is owned by the defendant, and the defendant has, besides this, a lease of the said road and is operating and controlling it; (b) the defendant has a perpetual lease, or one for nine hundred and ninety nine years, upon the road from Nashville, Tennessee, to Decatur, Alabama, and practically owns the said line in fee simple and absolutely controls and operates the same; (c) the title of the line from Decatur, Alabama, to Montgomery, Alabama, is vested in a corporation known as the South & North Alabama Railroad, but all of the stock of this railroad is owned by the defendant, and the defendant absolutely controls same, in the same manner and to the same extent as if it had absolute title thereto.

17. That the proceedings to condemn the right to maintain the poles, wires and other apparatus of the complainant, for a telegraph line, upon that part of the railroad of the defendant between the Wabash River and the low water mark of the Ohio River opposite Henderson, Kentucky, are being conducted by the Western Union Telegraph Company of Indiana, which is an Indiana corporation but the complainant has an arrangement with the said company by which, if and when it shall condemn said right of way, the said Western Union Telegraph Company of Indiana will use the poles, wires and other apparatus of the complainant. The complainant further states that the same is true as to the part of the railroad from East St. Louis to the Wabash River in the State of Illinois; that is to say, the condemnation proceedings are there being conducted by a corporation organized under the laws of the State of Illinois, called the Western Union Telegraph Company of Illinois, with which corporation the complainant has an agreement similar to that above described with the Western Union Telegraph Company of Indiana.

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18. That on or about August 7, 1912, the defendant delivered to the complainant a notice, in writing, dated August 5, 1912, a copy of which is filed herewith as part hereof, marked "Exhibit B". By that notice the defendant advised the complainant that it must begin, not later than September 1st, 1912, to remove its poles, cross-arms, wires, batteries, instruments, appliances and other fixtures composing its telegraph line, from the right of way of the defendant, and that such removal must be accomplished entirely by December 1, 1912; and further notified the complainant that in default of its so vacating the right of way and premises of the defendant, or in the event of failure or refusal to remove therefrom the poles, cross-arms, batteries, instruments, appliances and other fixtures prior to December 1st, 1912, the defendant would take possession of, appropriate and use, all and singular, the said poles, cross-arms, wires, batteries, instruments, appliances and other fixtures, or so much thereof as might be, on or after the said last named day, to-wit; December 1st, 1912, on the said rights of way or premises of the defendant in all or

1

either of the States of Ohio, Indiana, Illinois, Missouri, Tennessee, Virginia, North Carolina, Georgia, Alabama, Florida, Mississippi and Louisiana, and hold, use, operate, maintain and otherwise dispose of the same as the property of the defendant and refuse to allow the complainant to remove or use the same in any manner or for any purpose.

19. That at the time notice was given as above described there were pending the following proceedings:

(1) Proceedings in the Courts of the State of Illinois, by the Western Union Telegraph Company of Illinois, to condemn the right to construct, maintain and operate a telegraph line on the right of way of the railroad of the defendant from East St. Louis to the Wabash River;

(2) Proceedings in the Courts of the State of Indiana, by the Western Union Telegraph Company of Indiana, to condemn the right to construct, maintain and operate a telegraph line on the right of way of the railroad of the defendant from the Wabash River, through Evansville, to the low water mark on the Ohio River, opposite Henderson, Kentucky;

(3) Proceedings by the complainant to condemn the right to construct, maintain and operate a telegraph line on the right of way of all of the railroads of the defendant in the State of Kentucky;

(4) Proceedings in the Courts of the State of Tennessee, by complainant, to condemn the right to construct, maintain and operate a telegraph line on the right of way of the railroads of the defendant in Tennessee, including the right of way from Nashville boundary line in Alabama;

(5) Proceedings in the Courts of the State of Alabama, by the complainant, to condemn the right to construct, maintain and operate a telegraph line on the right of way of all the railroads of the defendant in the State of Alabama, including the line of the South & North Railroad from Decatur to Montgomery;

(6) Proceedings in the Courts of the State of Georgia, by the complainant, to condemn the right to construct, maintain and operate a telegraph line on the right of way of the railroad of the defendant from the State Line between Mississippi and Alabama to the Louisiana State Line;

(7) Proceedings in the Courts of the State of Mississippi, by the complainant, to condemn the right to construct, maintain and operate a telegraph line on the right of way of the railroad of the defendant from the State Line between Mississippi and Alabama to the Louisiana State Line;

175 (8) Proceedings in the Courts of the State of Louisiana, by the complainant, to condemn the right to construct, maintain and operate a telegraph line on the right of way of the railroads of the defendant in Louisiana;

(9) Proceedings in the Courts of the State of Florida, by the complainant, to condemn the right to construct, maintain and operate a telegraph line on the right of ways of the railroads of the defendant in Florida;

That all of said proceedings are still pending and being vigorously pressed;

That in the State of Louisiana the complainant has secured a judgment condemning the right to construct, maintain and operate its telegraph line on the right of way of the defendant in that State, and that the case is now pending on the application of the defendant for a new trial;

That in Mississippi similar judgments have been obtained by the complainant, but that the defendant has a suit or suits pending to enjoin the complainant from the exercise of any right under the said proceedings so instituted by it.

(20) That the complainant has full corporate and legal authority to construct, maintain and operate lines of telegraph over and along the right of way of the defendant on all of the lines of railroad described herein, and full power to appropriate, by condemnation proceedings, such occupancy of the right of way of the defendant for the pur-

pose of so constructing, maintaining and operating said telegraph line, and that, as aforesaid, it is proceeding with all possible diligence to exercise this right of expropriation.

21. That the complainant is public utility company that its lines of telegraph have been constructed for public purposes, under the sanction of the public authorities, and that over these lines of telegraph the public have rights which should not be permitted to be obstructed; that the franchise granted to the complainant has been granted as a public trust to construct and operate, among
 176 others, the telegraph lines mentioned herein, and that to interrupt its use of said telegraph lines would be to prevent the rendition by the complainant of a public service due by it, and would greatly interfere with and injure the communities through which its lines of telegraph run as above described, and would also seriously interfere with communication by the public between different parts of the country connected by said telegraph lines as aforesaid.

22. That the complainant will be unable, notwithstanding all of its efforts, to conclude the hearing of its various causes before December, 1912, and there will be an incomplete determination of its legal rights in the premises at that time; that the interruption by the defendant of the services of the complainant of these lines, or the taking possession by the defendant of the poles, wires or other apparatus of the complainant on any of said lines, rendering it impossible to use the poles, wires or other apparatus so taken possession of, in the conduct of its business.

To the end, therefore, that the complainant may have a due and reasonable opportunity to test its legal rights in the premises, the complainant prays that this Court enjoin the defendant, the Louisville and Nashville Railroad Company, from putting into effect the threats contained in its said notice dated August 5th, 1912, by taking possession of or interrupting the complainant in the use of any of its poles, wires or other apparatus, until the rights of the complainant to expropriate so much of the right of way of the defendant as may be necessary to the use of the complainant, shall have been finally determined; such injunc-

177 tion to be for a reasonable time, (the complainant suggests six months from this date), with the power in the Court from time to time to enlarge such period as may be equitable, and such injunction to be against the defendant, the Louisville & Nashville Railroad Company, its officers, agents and servants, and to include in its terms not only the lines above mentioned as belonging in fee to the defendant, but also the lines controlled by it through the ownership of the entire capital stock.

May it please your Honors to grant unto your complainant a writ of subpoena, issued under the seal of this Court, commanding the defendant, the Louisville & Nashville Railroad Company, to appear herein and answer at an appropriate date, but not under oath, answer under oath that shall be decreed herein against it.

And this the complainant will ever pray.

RICHARDS & HARRIS,
HUMPHREY, MIDDLETON
& HUMPHREY,

Counsel for Complainant.

State of Kentucky,
County of Jefferson,

Charles Smith makes oath and says that he is the Manager of the Western Union Telegraph Company, with his office in the city of Louisville, Kentucky; that both the President and Secretary of said Company are absent from the State of Kentucky; that the foregoing petition is true to his own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

178 Subscribed and sworn to before me by Charles Smith this November 19, 1912. My commission expires January 26th, 1914.

LILLY R. WARREN,
Notary Public, Jefferson
County Kentucky.

179 And on December 28th, 1912, the following proceedings were had:

Western Union Telegraph Company,
 vs. No. 105.
 Louisville & Nashville Railroad Company.

This day came the parties by their respective counsel. This cause coming on to be heard upon the defendant's demurrer to the complainant's Bill of Complaint, as amended, and having been argued by counsel, and the Court being sufficiently advised thereof, it is considered, ordered and adjudged that said demurrer be, and it is hereby, overruled.

Western Union Telegraph Company,
 vs. No. 105.
 Louisville & Nashville Railroad Company,

The Court being advised, upon the motion of the complainant herein for a temporary injunction, delivered a written opinion, which is now ordered to be filed and made a part of the record.

And thereupon it is ordered that the Louisville & Nashville Railroad Company, its officers, agents and servants for six months from this date, or until the further order of the Court, with power in the Court from time to time to enlarge such restrained from taking possession of or interrupting the complainant in the use of its poles, wires or other apparatus situate upon the right of way of the defendant, Louisville & Nashville Railroad Company, upon

180 the following lines of railroad of said defendant, namely, a line of railroad from Cincinnati, Ohio, through the State of Kentucky to Louisville, Kentucky, thence south through the State of Kentucky to Nashville, Tennessee, thence south to Decatur, Alabama, thence south to Montgomery, Alabama, thence south to Mobile, Alabama, thence southwest to New Orleans, Louisiana; also a line of railroad beginning at Covington, Kentucky, and running thence South through the State of Kentucky, and the State of Tennessee, to Knoxville, Tennessee, thence through Tennessee and Georgia to Marietta and Junta, Georgia, and a belt road through the city of Atlanta, Georgia; also a line of railroad from St. Louis, Missouri, running thence southeast to Evansville,

Indiana; thence south through Henderson, Kentucky, crossing the State of Kentucky, to Edgefield Junction, near Nashville, Tennessee, where it joins the first named line above described; also a line of railroad branching from the main line first above described at Bardstown, Junction, Kentucky, and running to Springfield, Kentucky, another branch of Lebanon Junction, Kentucky, southeast through Kentucky to Livingston, where it joins the second main line above mentioned, and turning off from the second main line at Corbin, thence southeast and northeast to Norton in the State of Virginia, also a line of railroad branching from the main line first above described, at Memphis Junction, near Bowling Green, Kentucky, thence southwest to Memphis, Tennessee; also a line of railroad from Owensboro, Kentucky, to Adairville, Kentucky, also a line of railroad from Columbia, Tennessee, to Sheffield, Alabama, also a line of railroad from Calera, Alabama, to Gadsden, Alabama, and from Gadsden, Alabama, to Birmingham, Alabama, and from Birmingham to Tuscaloosa, Alabama; also a line of railroad from Georgiana,

181 Alabama, to Graceville, Florida, and from Flomaton, Alabama, to Pensacola, Florida, and thence to River Junction in the State of Florida; and also all branches and spurs from any of these lines owned by the defendant, Louisville & Nashville Railroad Company, and upon which the poles and wires of the complainant are now situated, but not including any line of the railroad in North Carolina.

It is ordered that this order is to be construed as requiring both parties to maintain the present statutes, but not to forbid the defendant from building any line which does not interrupt the service of the complainant's line nor the complainant from repairing and maintaining its line.

This order shall be of no further force or effect unless the complainant shall, within three days, execute a bond in the penalty of seventy-five thousand (\$75,000.00) dollars, with surety to be approved by the Court, conditioned to pay the defendant all damages which it may suffer by the suing out or continuing of this injunction.

The defendant moved the Court to fix the penalty of this bond in the sum of two hundred and fifty thousand (\$250,000.00) dollars, and the complainant moved the

Court to fix the penalty of said bond in the sum of fifty thousand (\$50,000.00) dollars but the Court overruled both of said motions and fixed the penalty of the bond as above recited.

182 In the United States District Court for the Southern Division of the Southern District of the State of Mississippi.

Louisville & Nashville Railroad Company, Complainant,

vs.

Western Union Telegraph Company, Defendant.

The above named Complainant, conceiving itself aggrieved by the decree rendered and filed in the above entitled cause on the 18th day of February, 1915, whereby it was decreed that the original bill of complaint and the supplemental bill of complaint in said cause be dismissed, now prays that this, its appeal to the United States Circuit Court of Appeals for the Fifth Judicial Circuit may be allowed for a review of the decree of the said United States District Court for the Southern Division of the Southern District of Mississippi, and that a citation in due form be issued.

And that the transcript of the record and proceedings, and papers upon which said final decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit.

183 And now, at the time of the filing of this petition for appeal, the said Louisville and Nashville Railroad Company files an assignment of errors setting up separately and particularly each error asserted and intended to be urged in the said United States Circuit Court of Appeals for the Fifth Judicial Circuit, and presents herewith for approval its appeal bond.

LOUISVILLE & NASHVILLE RAIL-
ROAD COMPANY.

GREGORY L. SMITH,
H. L. STONE,

Its Solicitor.

184 The foregoing petition having been presented and duly considered, it is ordered that the appeal therein prayed be allowed, that the appeal bond presented by said Louisville and Nashville R. R. Company with its said petition be and is hereby accepted and approved; and that the Clerk of this Court cause a duly authenticated transcript of the record, proceedings and papers upon which the decree appealed from was rendered to be transmitted to the Circuit Court of Appeals for the Fifth Judicial Circuit.

Made, this the 24th day of March, 1915.

H. C. NILES,
Judge of the United States District Court for the Southern Division of the Southern District of Mississippi.

The following appears on the back:
Application and Allowance of Appeal. Filed March 24th, 1915.

185 In the District Court of the United States for the Southern Division of the Southern District of Mississippi.

Louisville & Nashville Railroad Company, Complainant,
vs.

Western Union Telegraph Company, Defendant.

To the Western Union Telegraph Company or Mr. J. B. Harris, its Solicitor of Record:

Take notice, that a statement of the evidence to be included in the record upon appeal of said cause to the United States Circuit Court of Appeals for the Fifth Judicial Circuit has been prepared and lodged in the Clerk's office of said Court for examination by you, and that the Louisville and Nashville Railroad Company will, on the 24th day of March, 1915, present said statement to the Honorable Henry C. Niles, Judge Henry C. Niles, Judge of said Court, at Kosciusko, Miss., and ask his approval thereof.

GREGORY L. SMITH,

H. L. STONE,

Solicitor for the Complainant.

I hereby accept service of the foregoing notice, this the 10th day of March, 1915.

J. B. HARRIS,
Solicitor for the Defendant.

The following appears on the back. Notice of Presentation of statement of proceedings. Filed March 24th, 1915.

186 Circuit Court of Appeals for the Fifth Judicial Court.

Louisville & Nashville Railroad Company, Appellant,
vs.
Western Union Telegraph Company, Appellee.

Comes the Louisville and Nashville Railroad Company, the Plaintiff in Error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and decree of the United States District Court for the Southern Division of the Southern District Court for the Southern Division of the Southern District of Mississippi, made and filed on the 18th day of February, 1915, in the above entitled cause, and assigns error thereon as follows:

FIRST ASSIGNMENT OF ERROR.

The Court erred in not sustaining Appellant's objections to the introduction in evidence of Exhibit "B" to Appellee's answer to the original bill of complaint.

Said Exhibit consists of a duly certified transcript of the record and proceedings in the Supreme Court of Mississippi upon an appeal from the decree of the Chancery Court of Jackson County, Mississippi, overruling a motion to dissolve an injunction pendens lite issued by said Chancery Court. The ground of the motion was that there was no equity in the bill.

187 The bill of complaint set out in said record, sought to have three eminent domain judgments (one rendered in each of three counties in the

State of Mississippi) condemning parts of Appellant's right of way to Appellee's use for the erection and maintenance of Appellee's telegraph lines, annulled and set aside because the proceedings which resulted in said judgments did not comply in certain particulars with the laws of the State of Mississippi authorizing such proceedings; and also for the following further reasons:

1. Because the said condemnations were for the maintenance of an existing telegraph line, and not for the construction and maintenance of a new telegraph line, and there was, and is, no law authorizing condemnation of Appellant's rights of way for such purpose. The bill alleged that the Appellee, at the time of the commencement of said condemnation proceedings, was lawfully maintaining a telegraph line upon said right of way under a contract, but its right to continue the use of such right of way for said purpose would expire August 17th, 1912.

2. That the eminent domain laws under which said judgments were obtained, were and are, void, because they authorize the taking of property without due process of law, in that they afford the Appellant no opportunity to be heard as to Appellee's right to take its property.

3. That the condemnation of Appellant's right of way authorized an unreasonable interference with, and unreasonable regulations of, interstate commerce.

It appears from said record that the said Supreme Court of Mississippi held that it had no jurisdiction in said cause to dismiss the bill of complaint for want of equity, and that its only power was to dissolve the injunction issued by said Chancery Court, and that the only action taken by the said Supreme Court of Mississippi was to decree the dissolution of said injunction, and remanded said cause to the Chancery Court
188 for further proceedings therein.

SECOND ASSIGNMENT OF ERROR.

The Court erred in overruling Appellant's objections to the paper of which Exhibit "1" to the statement of proceedings and evidence, filed for the purpose of an appeal in this cause, is a copy.

This evidence consists of a typewritten paper purporting to be a mandate from the Supreme Court of Mississippi to the Chancery Court of Jackson County, Mississippi, in a cause entitled in the Supreme Court of Mississippi, "Western Union Telegraph Company vs. Louisville & Nashville Railroad Company," wherein it was recited that said cause having been submitted on the record from the Chancery Court of Jackson County, and the said Supreme Court of Mississippi having sufficiently examined and considered same, "being of opinion that there is error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause at the . . . term thereof, A. D. 191 . . , on the 6th day of November, 1912, be and the same is hereby reversed and injunction dissolved and cause remanded, and that the appellee do pay the costs of this appeal, to be taxed, etc.

You are therefore hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, the judgment of our Supreme Court and the law of the land ought to be had."

Attached to said mandate is a paper reading as follows:

"This cause coming on to be heard on the motion of the defendant to allow it a reasonable attorney's fee by way of damages for the wrongful suing out of the writ of injunction herein and to dismiss this cause and upon the motion of the Complainant to dismiss the same without prejudice it being agreed that both motions

189 should be tried together and the Court having heard the evidence on the question of damages and being of the opinion that the amount claimed, seven hundred and fifty dollars, is a reasonable solicitor's fee.

It is therefore ordered and decreed that the Western Union Telegraph Company do have and recover of and from the Louisville & Nashville Railroad Company and the National Surety Company of New York surety upon its injunction bond the sum of seven hundred and fifty dollars with interest at legal rate from this date until paid.

It is further ordered and decreed that this cause be and the same is hereby dismissed but without prejudice to the right of the complainant, the Louisville & Nash-

ville Railroad Company to challenge or dispute the power or right of the Western Union Telegraph Company to enter upon or maintain any line which is not a new line of telegraph within the meaning of the eminent domain statute of Mississippi along any of the property of said Railroad Company under and by virtue of the eminent domain judgment brought in question in this cause.

It is further ordered that complainant pay the costs of Court in this behalf expended for which let execution issue as to law.

Ordered and decreed this the 20th day of November, 1914.

J. M. STEVENS,
Chancellor."

Neither of said papers were certified or otherwise proven.

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THIRD ASSIGNMENT OF ERROR.

The Court erred in overruling the Appellant's objections to a pamphlet of which Exhibit "2" to the statement of proceedings and evidence is a copy. This pamphlet purported to be a copy of the record of a certain cause pending upon appeal in the United States Circuit Court of Appeals for the sixth Judicial Circuit, but was not certified or otherwise proven to be such record, nor was it shown that the cause had ever been determined by said Circuit Court of Appeals. Said pamphlet purported to show that a bill in equity had been filed by the Western Union Telegraph Company in the United States District Court for the Western District of Kentucky against the Louisville & Nashville Railroad Company on the 19th day of November, 1912, alleging among other things, that the Western Union Telegraph Company had for many years maintained a telegraph line upon the rights of way of the Louisville & Nashville Railroad Company, in various states, under a contract; that said contract had been terminated; that the Western Union Telegraph Company had been unable to agree with the Louisville & Nashville Railroad Company upon the terms upon which it would be allowed to continue to use the said rights of way of the Louisville & Nashville Railroad Com-

pany for its telegraph lines, and had instituted proceedings in various states in which said railroad rights of way were situated, to condemn them to the use of the said Western Union Telegraph Company's telegraph lines, and that the Western Union Telegraph Company would be unable to conclude said condemnation proceedings before December 1st, 1912, and that on August 5th, 1912, the Louisville & Nashville Railroad Company had notified the Western Union Telegraph Company that it must remove its said lines from the rights of way of the Louisville & Nashville Railroad Company before December 1st, 1912, and that in default thereof the Louisville & Nashville Railroad Company would take

191 possession of said telegraph lines. The prayer was that the "Court enjoin the defendant, the Louisville and Nashville Railroad Company, from putting into effect the threats contained in its notice dated August 5th, 1912, by taking possession of, or interrupting the complainant in the use of any of its poles, wires or other apparatus until the rights of complainant to expropriate so much of the rights of way of the defendants as may be necessary to the use of the complainant shall have been fully determined; such injunction to be for a reasonable time, (complainant suggests six months from this date) with the power in the Court from time to time to enlarge said period as may be equitable.

Said pamphlet further contained what purported to be a copy of the contract formerly existing between the Western Union Telegraph Company and the Louisville and Nashville Railroad Company that had been terminated as alleged in the bill of complaint, and also a number of affidavits in support of the motion for the injunction, and also an order granting an injunction pendants lite as prayed for, enjoining the Louisville and Nashville Railroad Company "from taking possession of, or interrupting the complainant in the use of any of its poles, wires or other apparatus existing upon the rights of way of the defendant, the Louisville and Nashville Railroad Company, upon the following lines of railroad of said defendant, namely, (here followed a description of various portions of the Louisville and Nashville Railroad Com-

pany's right of way, including its right of way from Mobile, 'thence southwest to New Orleans, Louisiana').

"It is ordered that this order is to be construed as requiring both parties to maintain the present status and not to forbid the defendant from building any line which does not interrupt the service of complainant's line, nor complainant from repairing or maintaining its line."

192 Said pamphlet further purports to show an appeal to the Circuit Court of Appeals for the Sixth Judicial Circuit, from said interlocutory decree granting said injunction.

FOURTH ASSIGNMENT OF ERROR.

The Court^{error} in granting Appellee's motion to dismiss the Appellant's original and supplemental bill and in rendering a final decree dismissing Appellant's original and supplemental bill.

In granting said motion and rendering said decree dismissing the Appellant's original and supplemental bill, the Court, erroneously held as follows:

1. That all matters complained of in said original and supplemental bill had been adjudicated against the Appellant by the judgment of the Supreme Court of Mississippi in the case shown by Exhibit "B" to Appellee's answer to Appellant's original bill of complaint, or by the State Chancery Court of Jackson County, Mississippi, by what is claimed to be a final decree shown by Exhibit "1" to the statement of proceedings and evidence made for the purpose of an appeal in this cause.

2. That the proceedings in which the three eminent domain proceedings complained of in the bill of complaint in this cause constituted due process of law, and authorized Appellee to take and occupy Appellant's right of way for the erection and maintenance of an existing telegraph line, although, said condemnations purported to be for the use of the new lines, and Appellee had no power under the laws of Mississippi to condemn said

rights of way for any other purpose, and yet Appellant was, by said law afforded no right to be heard as to Appellee's right to condemn its right of way.

3. That the Appellee had the right to condemn Appellant's rights of way for the use of Appellee's telegraph lines, although, it was shown by the allegations of the bill of complaint that the Appellant's right of way was part of a post road of the United States, and that said road had been declared by the Congress of the United States, and although the State of Mississippi had no right or power to authorize the Appellee to condemn the right of way of such a railroad for the telegraph purposes.

4. That the Appellee had the right to condemn Appellant's right of way to the use of its telegraph line, although, such right of way was shown by the allegations of the bill of complaint to have already been devoted to a public use.

5. That the Appellee had the right to take and occupy the Appellant's right of way under said condemnation proceedings, although such right of way was shown by the allegations of the bill of complaint to have already been devoted to a public use, and Appellant had not been afforded an opportunity to be heard as to the right of Appellee to take said rights of way so devoted to a public use.

6. That the eminent domain judgments complained of were valid, although the Appellee had no authority to take property other than for a public use, and Appellant had shown by the allegations of the bill of complaint not to have been afforded an opportunity to be heard as to whether the use for which its right of way was taken, was a public use.

7. That the eminent domain judgments complained of were valid, although the Appellee had no right to condemn Appellant's right of way for the use of a telegraph line that would be dangerous to persons or property,

or that would interfere with the convenience of the Appellant more than was unavoidable, and it was shown by the allegations of the bill of complaint that the Appellant was not afforded an opportunity to be heard as to whether said proposed telegraph line would be dangerous to persons or property, or would interfere
 194 with the convenience of Appellant more than was unavoidable.

8. That the eminent domain judgments complained of are valid, although they are, on their several faces, indefinite and uncertain as to the property subjected to the use of the Appellee, and are each void for want of certainty in the description in the description of said property.

9. That the eminent domain judgments complained of subject Appellant's bridges over navigable waters of the United States in the State of Mississippi to the use of Appellee for its telegraph lines, although there is no valid law of the State of Mississippi that subjects such bridges for such purposes is an interference with the regulation of navigable streams provided for by the Acts of Congress authorizing and regulating the construction of railroad bridges thereover.

10. That the United States District Court did not have jurisdiction to enjoin a continuous trespass by Appellee upon Appellant's rights of way, by the maintenance thereon of a telegraph line existed and was located upon Appellant's right of way when the eminent domain proceedings complained of were instituted, and were still located thereon on the 17th day of August, 1912, under which said telegraph line had been constructed and maintained, was terminated.

11. That the United States District Court did not have jurisdiction to prevent by injunction, Appellee, (a corporate body having compulsory power to enter upon, take and appropriate to its own use, the lands of Appellant,) from the abuse of its said power by maintaining and existing telegraph line upon a right of way condemned for the use of a new line and for no other purpose.

195 12. That the United States District Court did not have jurisdiction to prevent by injunctive relief, a multiplicity of suits at law that would be necessary to eject Appellee from the use of Appellant's rights of way from an unlawful purpose in three separate counties in the state of Mississippi.

FIFTH ASSIGNMENT OF ERROR.

The Court erred in not decreeing that the prayer of the Appellant's bill as amended be granted on the following grounds, to-wit:

1. The claim of the Appellee to a right of way on and along the Appellant's railroad right of way in the State of Mississippi where Appellee's old or present lines of poles and wires is located is invalid because founded upon the eminent domain proceedings set up and referred to in the bill, which amount to a taking of Appellant's property without due process of law, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, and that said claim of the Appellee constitutes an incumbrance or cloud upon the title to the real property of the Appellant which the Appellant is entitled to have removed and declared to be null and void by the decree of the Court in accordance with the prayer of its bill amended.

2. The Appellant is empowered and authorized by the amendment to its charter and under the laws of the United States referred to in Paragraph XVI. of its bill to own, construct, operate and maintain telegraph and telephone lines on, over and along its railroad right of way, not only for the conduct of its own railroad business but commercially, as a common carrier of messages, news, intelligence and information for the public at large, and the receipt and delivery thereof for just and reasonable compensation or hire in the State of Mississippi and other states into or through which its railroad lines extend, as set forth in said paragraph of its bill; that it is, therefore, entitled to all the rights, powers and privileges of a telegraph company,

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as well as a railroad company, and the statutes of Mississippi do not authorize or undertake to authorize the condemnation by a telegraph company of the property of another telegraph company in that state, and the said eminent domain proceedings instituted by the Appellee and referred to in the Appellant's bill, under which the appellee claims the possession and right to use the location on Appellant's right of way in Mississippi where its line of poles and wires are now and has heretofore been located, and said statutes of Mississippi, if they when properly construed attempt to grant such power of condemnation by one telegraph company of the property of another telegraph company, are in contravention of sub-section 3, section 8, article 1 of the Constitution of the United States, which vests in Congress the complete and exclusive power to regulate commerce among several states, and said proceedings and statutes, construed as aforesaid, lay a burden upon interstate commerce and the instrumentalities thereof, such as the Appellant's said line of railroad and right of way in the State of Mississippi and in other states connected with each other so as to form continuous lines for the transportation of passengers, troops, government supplies, mail, freight and property on their way from one state to another, and amount to and operate as a regulation of commerce among the several states, and materially and substantially trammel, obstruct and interfere with such commerce, and are in conflict with the provisions of the Acts of Congress set out and referred to in Paragraph XVI. of Appellant's bill, and are, therefore, unconstitutional and void.

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GREGORY L. SMITH,
H. L. STONE,
Solicitors for Plaintiff in Error.

The following appears on back: Assignment of Error.
Filed March 24th, 1915.

198 To the Western Union Telegraph Company,—
Greetings:

You are cited and admonished to be and appear before the Circuit Court of Appeals for the Fifth Judicial Circuit at New Orleans, Louisiana, within thirty (30) days from the date hereof, pursuant to an order allowing the appeal filed in the Clerk's office of the United States District Court for the Southern Division of the Southern District of Mississippi, wherein the Louisville & Nashville Railroad Company is Appellant and you are Appellee, to show cause, if any there be, why the decree made against the Appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Niles, Judge of the United States District Court for the Southern Division of the Southern District of Mississippi, this the 24th day of March in the year of our Lord one thousand nine hundred and fifteen.

H. C. NILES,

Judge of the United States District Court for the Southern Division of the Southern District of Mississippi.

We hereby acknowledge receipt of a copy of the foregoing citation, and hereby accept service thereof for the defendant in error, the Western Union Telegraph Company, this the 24th day of March, 1915.

J. B. HARRIS.

.....
Solicitors for the defendant in error, Western Union Telegraph Company.

The following appears on the back: Citation on Appeal and Acceptance of Service. Filed March 24th, 1915.

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APPEAL BOND.

District Court of the United States for the Southern
Division of the Southern District of Mississippi.

Louisville & Nashville Railroad Company

vs.

Western Union Telegraph Company.

Know all men by these presents, That we, the Louisville and Nashville Railroad Company, Principal, and the National Surety Company of New York, as Surety, are held and firmly bound unto the Western Union Telegraph Company in the sum of five hundred dollars (\$500.00) to be paid to the said Western Union Telegraph Company, its successors or assigns. To which payment well and truly be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, successors and assigns, firmly by these presents.

Sealed, with our seals and signed in our corporate names, this the 22nd day of March, 1915.

Whereas, the above named Louisville & Nashville Railroad Company has prayed an appeal to the United States Circuit Court of Appeals for the Fifth Judicial Circuit to reverse the decree rendered in the above entitled cause by the District Court of the United States for the Southern Division of the Southern District
200 of Mississippi;

Now, therefore, the condition of this obligation is such that if the above named Louisville & Nashville Railroad Company shall prosecute its appeal to effect, and answer all costs of it shall fail to make good its place, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

LOUISVILLE & NASHVILLE RAIL-
ROAD COMPANY,
By GREGORY L. SMITH,
Its Attorney of Record.

Approved March 24th, 1915.

H. C. NILES, Judge.

NATIONAL SURETY COMPANY,

By
Its Attorney in fact.

The following appears on the back: No. 4. Appeal Bond. Filed March 24th, 1915.

201 In the United States District Court for the
Southern Division of the Southern District
of Mississippi.

Louisville & Nashville Railroad Company,
vs.
Western Union Telegraph Company.

To the Clerk of the United States District Court for the
Southern Division of the Southern District of Mis-
sissippi:

The Appellant, the Louisville and Nashville Railroad Company, desires, a transcript of the record in said cause to be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, pursuant to the appeal by complainant from the decree of the said District Court sustaining the motion of Appellee to dismiss the bill of complaint, and decreeing that the original bill of complaint and the supplemental bill be dismissed, said transcript to consist of the following portions of the record in said cause;

1. The original bill of complaint, and Exhibits.
2. The answer to the original bill of complaint, and the exhibits thereto.
- 202 3. The supplemental bill of complaint.
4. The answer to the supplemental bill, with the exhibits attached thereto.

5. The amendment to the answer to the original bill, filed by leave of the Court February 18th, 1915, without the exhibits thereto.

6. Statement of the proceedings and evidence made for the purpose of appeal, and the following portions of Exhibit "2" to said statement of proceedings and evidence, viz:

The title of the pamphlet marked "Exhibit "2" as shown by the printing upon the back thereof; pages one (1) to page eleven, (11) inclusive, of said pamphlet, containing the caption of what purports to be the record, and the original bill of complaint therein set out, without exhibits; also so much of page three hundred five (305) as commences with these words, viz, "And on December 28th, 1912, the following proceedings were had" and continuing through page three hundred six (306).

7. Agreement of counsel, dated 24th day of March, 1915, authorizing the omission of so much of Exhibit "2" to the statement of proceedings and evidence as is not included in specification No. 6 hereof.

8. Application for appeal, and allowance thereof.

9. Citation and service upon Appellee.

10. This praeceipe.

GREGORY L. SMITH,
H. L. STONE,
Solicitor for Complainant.

The following appears on the back: Filed March 24th, 1915.

203 In the District Court of the United States for
 the Southern District of Mississippi.

I, L. B. MOSELEY, clerk of the District Court of the United States for the Southern District of Mississippi do hereby certify that the foregoing 202 pages contain a true and correct copy of the proceedings had and done in the case of the L. & N. R. R. Co. vs. The Western Union Telegraph Company as the same appears of record in my office at Biloxi, Mississippi.

Witness my hand and the seal of said Court hereto affixed at Jackson, Mississippi, in said District, this the 13th day of April, 1915.

[Seal]

L. B. MOSELEY, Clerk.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of January 18th, 1916.

No. 2772.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

versus

WESTERN UNION TELEGRAPH COMPANY.

On this day this cause was called, and, after argument by Gregory L. Smith, Esq., for appellant, and J. B. Harris, Esq., was submitted to the Court.

Opinion of the Court.

Filed May 15th, 1916.

Number 2772.

In the United States Circuit Court of Appeals, Fifth Circuit.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY, Appellee.

Appeal from the District Court of the United States for the Southern District of Mississippi.

Gregory L. Smith, (Henry L. Stone and Joel W. Goldsby, on the brief), for appellant.

J. B. Harris, George H. Fearons, Charles Payne Fenner, and W. B. Spencer, (Rush Taggart and Albert T. Benedict, on the brief), for appellee.

Before Pardee and Walker, Circuit Judges, and Newman, District Judge.

WALKER, *Circuit Judge*:

This is an appeal from a decree dismissing the original bill and a supplemental bill filed in the District Court. That decree followed a motion of the defendant to dismiss the bill for the reason that the merits of the cause have been fully adjudicated adversely to the complainant in a suit instituted by it in a court of the State of Mississippi

against the defendant, and to dismiss the supplemental bill for the reason that the same was filed in violation of an injunction issued by the District Court of the United States for the Western District of Kentucky in a suit between the same parties.

On the hearing of the motion the defendant offered in evidence what purported to be a transcript of the proceedings, including a final decree of dismissal, in a suit between the same parties in a chancery court of Mississippi. The plaintiff objected to so much of that paper as purported to be a decree of the chancery court upon the ground that it was not properly authenticated as a final decree of said court. The evidence was admitted over this objection. This ruling is assigned as error. It is urged upon us as a ground supporting the objection to the admissibility of the purported transcript that the name of the clerk of the court appearing at the foot of the certificate, which was under the seal of the court, was in typewriting. There is nothing in the record to indicate that this specific ground of objection to the evidence offered was called to the attention of the trial court or made known to the opposing party or its counsel. In the statement of the evidence which was made part of the record for this appeal there is a recital in reference to the paper offered and admitted in evidence that every part of it was in typewriting. It is not made to appear that in any way attention was called to this fact prior to the recital of it in the statement of evidence prepared and submitted after the decree appealed from was rendered. An appellate court is not required to regard such a general objection to evidence, made in such terms as to be calculated to conceal rather than disclose the real reason relied on for the rejection of the evidence. The objection as made cannot be permitted to form the basis of a reversal of the decree, because it failed to point out in what respect the authentication of the State court decree was deemed to be insufficient, and failed to make known to the court or to opposing counsel the ground of objection really relied on. *Ottumwa Box Car Loader Co., v. Christy Box Car Loader Co.*, 215 Fed. 362; 38 Cyc. 1388. It well may be supposed that the ground of objection now urged could and would readily have been obviated if it had been made known.

The bill in the state court presented substantially the same issues as were presented by the original bill in this case. Those issues were adjudicated against the appellant by the decree of the state court dismissing the bill filed in it, and are not subject to be relitigated in this case. *Dowell v. Applegate*, 152 U. S., 327; *Forsyth v. Hammond*, 166 U. S. 506; *Mitchell v. First National Bank of Chicago*, 180 U. S. 471.

The supplemental bill filed by the appellant prayed for an injunction restraining and enjoining the defendant, the appellee here, from maintaining and operating upon the rights of way of the appellant the poles, wires and other telegraphic appliances which the appellee had constructed, maintained and operated upon said rights of way under a contract with the appellant which it was alleged expired on August 17th, 1912. By writs of injunction issued under orders made in a suit between appellant and appellee in the United States District Court for the Western District of Kentucky, certified copies of which

were made exhibits to the appellee's answer to the supplemental bill, the appellant was enjoined and restrained from taking possession of or interrupting the appellee in the use of any of its poles, wires or other apparatus situated upon the right of way of the defendant which was referred to in the original and supplemental bills in this case, and by the terms of the last of said orders the injunction issued thereunder was to be operative until the further order of the court from which it issued. We think it is apparent that the necessary effect of granting the relief which the supplemental bill prayed would be to enable the appellant to do, under the protection of the orders of one court, what it has been forbidden to do by a valid order of another court which is in full force and effect. A bill the object of which is to bring about such a result is not maintainable.

The conclusion is that it has not been made to appear that the decree appealed from was erroneous; and it is

Affirmed.

Judgment.

Extract from the Minutes of May 15th, 1916.

No. 2772.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

VERSUS

WESTERN UNION TELEGRAPH COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Louisville & Nashville Railroad Company, and the surety on the appeal bond herein, National Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Petition for Appeal and Order Allowing Same.

Filed March 23d, 1917.

In the United States Circuit Court of Appeals for the Fifth Judicial Circuit.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

VS.

THE WESTERN UNION TELEGRAPH COMPANY, Appellee.

Appellant, the Louisville & Nashville Railroad Company, considering itself aggrieved by the judgment rendered and filed in the above entitled cause on the 15th day of May, 1916, whereby the decree of the United States District Court for the Southern District of Mississippi was affirmed, now prays that this, its appeal to the United States Supreme Court be allowed for a review of the judgment of the said United States Circuit Court of Appeals for the Fifth Judicial Circuit, and that a citation in due form be issued.

And that the transcript of the record and proceedings and papers, upon which said judgment of affirmance was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

And now at the time of the filing of this petition for appeal, the said Louisville & Nashville Railroad Company files an assignment of error, setting up separately and particularly each error asserted and intended to be heard in the said Supreme Court of the United States, and presents herewith for approval, its appeal bond.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

(Signed) By GREGORY L. SMITH,
HENRY L. STONE, *Its Solicitors.*

The foregoing petition having been presented and duly considered, it is ordered that the appeal, therein prayed, be allowed; that the appeal bond presented by the said Louisville & Nashville Railroad Company, with its said petition, be, and is hereby accepted and approved; and that the Clerk of this Court cause a duly authenticated transcript of the record, proceedings and papers upon which the decree appealed from was rendered, to be transmitted to the Supreme Court of the United States.

Made, this the 23 day of March, 1917.

(Signed) DON A. PARDEE,
Judge of the United States Circuit Court of Appeals for the Fifth Judicial Circuit.

Assignment of Errors.

Filed March 23d, 1917.

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY, Appellee.

Comes the Louisville & Nashville Railroad Company, the Plaintiff in error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and decree of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, wherein it affirmed the decree of the United States District Court for the Southern Division of the Southern District of Mississippi, made and filed on the 18th day of February, 1915, in the above entitled cause, and assigns error thereon as follows:—

First Assignment of Error.

The said Circuit Court of Appeals erred in affirming the decree of the said District Court in that the said District Court erred in not sustaining Appellant's objections to the introduction in evidence of Exhibit "B" to Appellee's answer to the original bill of complaint.

Said Exhibit consists of a duly certified transcript of the record and proceedings in the Supreme Court of Mississippi upon an appeal from the decree of the Chancery Court of Jackson County, Mississippi, overruling a motion to dissolve an injunction pendente lite issued by said Chancery Court. The ground of the motion was that there was no equity in the bill.

The bill of complaint set out in said record, sought to have three eminent domain judgments (one rendered in each of three counties in the State of Mississippi) condemning parts of Appellant's right of way to Appellee's use for the erection and maintenance of Appellee's telegraph lines, annulled and set aside because the proceedings which resulted in said judgments did not comply in certain particulars with the laws of the State of Mississippi authorizing such proceedings; and also for the following further reasons:—

1. Because said condemnations were for the maintenance of an existing telegraph line, and not for the construction and maintenance of a new telegraph line, and there was, and is, no law authorizing condemnation of Appellant's rights of way, for such purpose. The bill alleged that the Appellee, at the time of the commencement of said condemnation proceedings, was lawfully maintaining a telegraph line upon said right of way under a contract, but its right to continue the use of such right of way for said purposes would expire August 17th, 1912.

2. That the eminent domain laws under which said judgments

were obtained, were, and are, void, because they authorize the taking of property without due process of law, in that they afforded the Appellant no opportunity to be heard as to Appellee's right to take its property.

3. That the condemnation of Appellant's rights of way authorized an unreasonable interference with, and unreasonable regulations of, interstate commerce.

It appears from said record that the said Supreme Court of Mississippi held that it had no jurisdiction in said cause to dismiss the bill of complaint for want of equity, and that its only power was to dissolve the injunction issued by said Chancery Court, and that the only action taken by the said Supreme Court of Mississippi was to decree the dissolution of said injunction, and remanded said cause to the Chancery Court of Jackson County for further proceedings therein.

Second Assignment of Error.

Said Circuit Court of Appeals erred in affirming the decree of the said District Court.

In that said District Court erred in overruling Appellant's objections to the paper of which Exhibit "1" to the statement of proceedings and evidence, filed for the purpose of an appeal to the Circuit Court of Appeals in this cause, is a copy.

This evidence consists of a typewritten paper purporting to be a mandate from the Supreme Court of Mississippi to the Chancery Court of Jackson County, Mississippi, in a cause entitled in the Supreme Court of Mississippi, "Western Union Telegraph Company vs. Louisville & Nashville Railroad Company," wherein it was recited that said cause having been submitted on the record from the Chancery Court of Jackson County, and the said Supreme Court of Mississippi having sufficiently examined and considered the same, and "being of opinion that there is error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause at the — term thereof, A. D. 19—, on the 6th day of November, 1912, be and the same is hereby reversed and injunction dissolved and cause remanded, and that the appellee do pay the costs of this appeal, to be taxed, etc.

You are therefore hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, the judgment of our Supreme Court and the law of the land ought to be had."

Attached to said mandate is a paper reading as follows:

"This cause coming on to be heard on the motion of the defendant to allow it a reasonable attorney's fee by way of damages for the wrongful suing out of the writ of injunction herein, and to dismiss this cause and upon the motion of the Complainant to dismiss the same without prejudice it being agreed that both motions should be tried together, and the Court having heard the evidence on the question of damages and being of the opinion that the amount claimed, Seven Hundred and Fifty Dollars, is a reasonable solicitor's fee;

It is therefore ordered and decreed that the Western Union Tele-

graph Company do have and recover of and from the Louisville & Nashville Railroad Company and the National Surety Company of New York, surety upon its injunction bond the sum of Seven Hundred and Fifty Dollars with interest at legal rate from this date until paid.

It is further ordered and decreed that this cause be and the same is hereby dismissed but without prejudice to the right of the complainant, the Louisville & Nashville Railroad Company to challenge or dispute the power or right of the Western Union Telegraph Company to enter upon or maintain any line which is not a new line of telegraph within the meaning of the eminent domain statute of Mississippi along any of the property of said Railroad Company under and by virtue of the eminent domain judgment brought in question in this cause.

It is further ordered that complainant pay the costs of Court in this behalf expended for which let execution issue as at law.

Ordered and decreed this the 20th day of November, 1914.

J. M. STEVENS,
Chancellor."

Neither of said papers were certified or otherwise proven.

Third Assignment of Error.

The said Circuit Court of Appeals erred in affirming the decree of said District Court,

In that said District Court erred in overruling the appellant's objections to a pamphlet of which Exhibit "2" to the statement of proceedings and evidence is a copy.

This pamphlet purported to be a copy of the record of a certain cause pending upon appeal in the United States Circuit Court of Appeals for the Sixth Judicial Circuit, but was not certified or otherwise proven to be such record, nor was it shown that the cause had ever been determined by said Circuit Court of Appeals. Said pamphlet purported to show that a bill in equity had been filed by the Western Union Telegraph Company in the United States District Court for the Western District of Kentucky against the Louisville & Nashville Railroad Company on the 19th day of November, 1912, alleging among other things, that the Western Union Telegraph Company had for many years maintained a telegraph line upon the rights of way of the Louisville & Nashville Railroad Company, in various states, under a contract; that said contract had been terminated; that the Western Union Telegraph Company had been unable to agree with the Louisville & Nashville Railroad Company upon the terms upon which it would be allowed to continue to use the said rights of way of the Louisville & Nashville Railroad Company for its telegraph lines, and had instituted proceedings in various states in which said railroad rights of way were situated, to condemn them to the use of the said Western Union Telegraph Company's telegraph lines, and that the Western Union Telegraph Company would be unable to conclude said condemnation proceedings before December

1st, 1912, and that on August 5th, 1912, the Louisville & Nashville Railroad Company had notified the Western Union Telegraph Company that it must remove its said lines from the rights of way of the Louisville & Nashville Railroad Company before December 1st, 1912, and that in default thereof, the Louisville & Nashville Railroad Company would take possession of said telegraph lines. The prayer was that the "Court enjoin the defendant, the Louisville & Nashville Railroad Company, from putting into effect the threats contained in its said notice dated August 5th, 1912, by taking possession of, or interrupting the complainant in the use of any of its poles, wires or other apparatus until the rights of the complainant to expropriate so much of the rights of way of the defendant as may be necessary to the use of the complainant shall have been fully determined; such injunction to be for a reasonable time (complainant suggests six months from this date) with the power of the Court from time to time to enlarge said period as may be equitable."

Said pamphlet further contained what purported to be a copy of the contract formerly existing between the Western Union Telegraph Company and the Louisville & Nashville Railroad Company that had been terminated as alleged in the bill of complaint, and also a number of affidavits in support of the motion for an injunction, and also an order granting an injunction pendente lite as prayed for, enjoining the Louisville and Nashville Railroad Company "from taking possession of, or interrupting the complainant in the use of any of its poles, wires or other apparatus existing upon the rights of way of the defendant, the Louisville & Nashville Railroad Company, upon the following lines of railroad of said defendant, namely (here followed a description of various portions of the Louisville & Nashville Railroad Company's right of way, including its right of way from Mobile, 'thence southwest to New Orleans, Louisiana.')

"It is ordered that this order is to be construed as requiring both parties to maintain the present status and not to forbid the defendant from building any line which does not interrupt the service of complainant's line, nor complainant from repairing or maintaining its line."

Said pamphlet further purports to show an appeal to the Circuit Court of Appeals for the Sixth Judicial Circuit, from said interlocutory decree granting said injunction.

Fourth Assignment of Error.

The said Circuit Court of Appeals erred in affirming the decree of the said District Court,

In that the said District Court erred in granting Appellee's motion to dismiss the Appellant's original and supplemental bill, and in rendering a final decree dismissing Appellant's original and supplemental bill.

In granting said motion and rendering said decree dismissing the Appellant's original and Supplemental bill, the said District Court erroneously held as follows:

1. That all matters complained of in said original bill of com-

plaint had been adjudicated against the Appellant by the judgment of the Supreme Court of Mississippi in the case shown by Exhibit "B" to Appellee's answer to Appellant's original bill of complaint, or by the State Chancery Court of Jackson County, Mississippi, by what is claimed to be a final decree shown by Exhibit "1" to the statement of proceedings and evidence made for the purpose of an appeal in this cause.

2. That the supplemental bill was filed in violation of an injunction issued by the District Court of the United States for the Western District of Kentucky by the Western Union Telegraph Company against the Louisville and Nashville Railroad Company.

3. That the proceedings in which the three eminent domain judgments complained of in the bill of complaint in this cause constituted due process of law, and authorized Appellee to take and occupy Appellants' right of way for the erection and maintenance of an existing telegraph line, although said condemnations purported to be for the use of new lines, and appellee had no power under the laws of Mississippi to condemn said rights of way for any other purpose, and yet appellant was, by said law afforded no right to be heard as to Appellee's right to condemn its right of way.

3. That the Appellee had the right to condemn Appellant's rights of way for the use of Appellee's telegraph lines, although it was shown by the allegations of the bill of complaint that the Appellant's right of way was part of a post road of the United States, and that said road had been declared by the Congress of the United States, and although the State of Mississippi had no right or power to authorize the Appellee to condemn the right of way of such a railroad for telegraph purposes.

4. That the appellee had the right to condemn Appellant's right of way to the use of its telegraph line, although such right of way was shown by the allegations of the bill of complaint to have already been devoted to a public use.

5. That the appellee had the right to take and occupy the Appellant's right of way under said condemnation proceedings, although such right of way was shown by the allegations of the bill of complaint to have already been devoted to an public use, and appellant had not been afforded an opportunity to be heard as to the right of appellee to take said rights of way so devoted to a public use.

6. That the eminent domain judgments complained of were valid, although the appellee had no authority to take property other than for a public use, and appellant had shown by the allegations of the bill of complaint not to have been afforded an opportunity to be heard as to whether the use for which its right of way was taken was a public use.

7. That the eminent domain judgments complained of were valid, although the appellee had no right to condemn appellant's right of way for the use of a telegraph line that would be dangerous to persons or property, or that would interfere with the convenience of the appellant more than was unavoidable, and it is shown by the allegations of the bill of complaint that the appellant was not afforded an opportunity to be heard as to whether said proposed telegraph line

would be dangerous to persons or property, or would interfere with the convenience of appellant more than was unavoidable.

8. That the eminent domain judgments complained of are valid, although they are, on their several faces, indefinite and uncertain as to the property subjected to the use of the appellee, and are each void for want of certainty in the description of said property.

9. That the eminent domain judgments complained of subject appellant's bridges over navigable waters of the United States in the State of Mississippi to the use of the appellee for its telegraph lines, although there is no valid law of the State of Mississippi that subjects such bridges to such use, and the use of appellant's said bridges for such purpose is an interference with the regulation of navigable streams provided for by the Acts of Congress authorizing and regulating the construction of railroad bridges thereover.

10. That the United States District Court did not have jurisdiction to enjoin a continuous trespass by appellee upon appellant's rights of way by the maintenance thereon of a telegraph line that existed and was located upon appellant's right of way when the eminent domain proceedings complained of were instituted, and were still located thereon on the 17th day of August, 1912, when the contract between the appellee and the appellant, under which said telegraph line had been constructed and maintained, was terminated.

11. That the United States District Court did not have jurisdiction to prevent by injunction, appellee (a corporate body having compulsory power to enter upon, take and appropriate to its own use, the lands of appellant), from the abuse of its said power by maintaining an existing telegraph line upon a right of way condemned for the use of a new line and for no other purpose.

12. That the United States District Court did not have jurisdiction to prevent by injunctive relief, a multiplicity of suits at law that would be necessary to eject appellee from the use of appellant's rights of way for an unlawful purpose in three separate counties in the State of Mississippi.

Fifth Assignment of Error.

The said Circuit Court of Appeals erred in affirming the decree of the said District Court

In that the said District Court erred in not decreeing that the prayer of the appellant's bill as amended be granted, on the following grounds, to-wit:—

1. The claim of appellee to have a right of way on and along the appellant's railroad right of way in the State of Mississippi where appellee's old or present line of poles and wires is located is invalid because founded upon the eminent domain proceedings set up and referred to in the bill, which amounts to a taking of appellant's property without due process of law, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, and that said claim of the appellee constitutes an incumbrance or cloud upon the title to the real property of the appellant which the appellant is entitled to have removed and declare to be null and void

by the decree of the court in accordance with the prayer of its bill as amended.

2. The appellant is empowered and authorized by the amendment to its charter and under the laws of the United States referred to in Paragraph XVI of its bill to own, construct, operate and maintain telegraph and telephone lines on, over and along its railroad right of way, not only for the conduct of its own railroad business, but commercially, as a common carrier of messages, news, intelligence and information for the public at large, and the receipt and delivery thereof for just and reasonable compensation or hire in the State of Mississippi and other states into or through which its railroad lines extend, as set forth in said paragraph of its bill; that it is, therefore entitled to all the rights, powers and privileges of a telegraph company, as well as a railroad company, and the statutes of Mississippi do not authorize or undertake to authorize the condemnation by a telegraph company of the property of another telegraph company in that State, and the said eminent domain proceedings instituted by the appellee and referred to in appellant's bill, under which the appellee claims the possession and right to use the location on appellant's right of way in Mississippi where its line of poles and wires is now and has heretofore been located, and said statutes of Mississippi, if they, when properly construed attempt to grant such power of condemnation by one telegraph company of the property of another telegraph company, are in contravention of sub-section 3, section 8, Article 1 of the Constitution of the United States, which vests in Congress the complete and exclusive power to regulate commerce among the several states, and said proceedings and statutes, construed as aforesaid, lay a burden upon interstate commerce and the instrumentalities thereof, such as appellant's said line of railroad and right of way in the State of Mississippi and in other States connected with each other so as to form continuous lines for the transportation of passengers, troops, government supplies, mail, freight and property on their way from one State to another, and amount to and operate as a regulation of commerce among the several states, and materially and substantially trammel, obstruct and interfere with such commerce, and are in conflict with the provisions of the Acts of Congress set out and referred to in Paragraph XVI of appellant's bill, and are, therefore unconstitutional and void.

(Signed)

GREGORY L. SMITH,
HENRY L. STONE,
Solicitors for Plaintiff in Error.

Bond on Appeal.

Filed March 23rd, 1917.

United States Circuit Court of Appeals for the Fifth Judicial Circuit.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY, Appellee.

Know all men by these presents, that we, The Louisville & Nashville Railroad Company, principal, and The Royal Indemnity Company, as Surety, are held and firmly bound unto the Western Union Telegraph Company in the sum of Five Hundred (\$500.00) Dollars, to be paid to the Western Union Telegraph Company, its successors or assigns, To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our, and each of our, successors and assigns firmly by these presents.

Sealed with our seals, and signed in our corporate name, this the 23d day of March, 1917.

Whereas, the above named Louisville & Nashville Railroad Company has prayed an appeal to the Supreme Court of the United States to reverse a judgment rendered in the above entitled cause by the Circuit Court of Appeals of the United States, for the Fifth Judicial Circuit,

Now, therefore, the condition of this obligation is such that if the above named Louisville & Nashville Railroad Company shall prosecute its appeal to effect and answer all costs and make good its plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE LOUISVILLE & NASHVILLE
RAILROAD CO.,

(Signed) By GREGORY L. SMITH, *Its Attorney.*
THE ROYAL INDEMNITY COM-
PANY, [SEAL.]

(Signed) By WM. A. TOURTAVEL,
Its Attorney in Fact.

Accepted March 23d, 1917.

(Signed) DON A. PARDEE, *Judge.**Clerk's Certificate.*

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals. Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 156 to 173 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court

of Appeals for the Fifth Circuit, in a certain cause in said Court numbered 2772, wherein Louisville & Nashville Railroad Company is appellant, and Western Union Telegraph Company is appellee, a full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 155 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 29th day of March, A. D. 1917.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,

Clerk of the United States Circuit Court of Appeals.

THE UNITED STATES OF AMERICA:

The President of the United States to Western Union Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a petition and order of appeal sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein Louisville and Nashville Railroad Company is appellant, and you are appellee, numbered 2772 on the docket of said Court, to show cause, if any there be, why the decree rendered against the said Louisville & Nashville Railroad Company and in said petition and order of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 24th day of March in the year of our Lord one thousand nine hundred and seventeen.

DON A. PARDEE,

United States Circuit Judge.

The Western Union Telegraph Company hereby accepts service of the within citation this, the 31 day of March, 1917.

J. B. HARRIS,

Att'y for W. U. Tel. Co.

[Endorsed:] No. 2772. United States Circuit Court of Appeals, Fifth Circuit. Louisville & Nashville Railroad Company, Appellant, vs. Western Union Telegraph Co., Appellee. Citation. Filed 2d day of April, 1917. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Endorsed on cover: File No. 25,914. U. S. Circuit Court Appeals, 5th Circuit. Term No. 1084. Louisville & Nashville Railroad Company, appellant, vs. Western Union Telegraph Company. Filed April 19th, 1917. File No. 25,914.